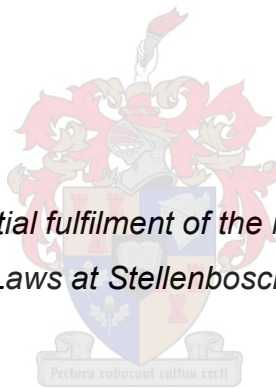


# **A common standard of habitability? A comparison between tenants, usufructuaries and occupiers in South African law**

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*Dissertation presented in partial fulfilment of the requirements for the degree of  
Doctor of Laws at Stellenbosch University*



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## **DECLARATION**

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

LR Ngwenyama,

01 October 2020, Stellenbosch

## SUMMARY

The purpose of this dissertation is to explore whether there is a common (or minimum) standard of habitability between tenants, usufructuaries and occupiers in South African law, and crucially to determine whether a common standard of habitability for these categories of inhabitants in South African law can be derived from the Constitution of the Republic of South Africa, 1996 (“Constitution”). The dissertation aims to also investigate whether the obligation to ensure such a standard of habitability for dwellings in all three categories of inhabitants rests on the owner, the state, or the occupant of the dwelling.

To determine whether dwellings are habitable, the dissertation considered the meaning of “habitability” in the context of each type of inhabitant. In the context of tenants, the dissertation found that habitability in terms of the common law is essentially based on the premise that the dwelling to be leased must be in a condition that is reasonably fit for the purpose for which it was rented. However, the common-law *fit for the purpose requirement* will change to *habitability* when the Rental Housing Amendment Act 35 of 2014 (“RHAA”) comes into effect. In terms of the RHAA, the *habitability requirement* implies that the dwelling must be safe and suitable to live in. Furthermore, the dwelling must offer the tenant adequate space, safeguard him or her against the elements and other threats to health, assure the tenant, his household and visitors physical safety, and the dwelling must be structurally sound. In the context of usufructuaries, a dwelling is habitable if it is fit for human habitation. This means that the dwelling must be free from defects and suitable for occupation. In the context of occupiers, habitability is read into constitutional rights such as adequate housing, security of tenure and human dignity. In this regard, a dwelling is habitable for occupiers (in terms of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”)) if occupiers reside in adequate housing that provides secure tenure and accords with standards of human dignity.

Concerning the question, on whom the obligation rests to ensure habitability, the dissertation found that in the context of tenants and usufructuaries the obligation to ensure that the property is habitable rests on the owner of the property. Concerning occupiers, it is not clear who must ensure the habitability of the dwelling. It is argued that the obligation to ensure that the property is habitable should primarily be on the owner. This is because the owner is enjoined by section 25(6) of the Constitution

through ESTA to accommodate an occupier on his or her property. As such, an owner who permits an occupier to use the property as accommodation incurs an obligation to ensure that the dwelling is habitable. However, where it is unreasonable for the landowner to ensure habitability, for instance, due to financial hardship or lack of resources, the state should be called upon to ensure that occupiers live in habitable conditions.

The dissertation concludes that there is currently no common standard of habitability across all three categories. This is because the categories of comparison are so individual that requiring a common standard will not work in all three contexts. However, it is argued that the Constitution forms the minimum standard that eventually forms the baseline in all the categories. This is because the Constitution arguably applies in all categories of comparison. As such, there should, at the very least, be some standard of habitability, which is informed by the Constitution and should be complied with in each individual category of inhabitant.

## OPSOMMING

Die doel van hierdie verhandeling is om vas te stel of daar 'n minimum gemeenskaplike standaard van bewoonbaarheid in die Suid-Afrikaanse reg bestaan, sover dit vruggebruikers, huurders en okkupeerders betref. As hoofsaak word ondersoek of so 'n gemeenskaplike standaard van bewoonbaarheid vir hierdie kategorieë van bewoners in die Suid-Afrikaanse reg, afleibaar is uit die Grondwet van die Republiek van Suid-Afrika, 1996 ("Grondwet"). Verder word ondersoek of die regsplig om so 'n standaard van bewoonbaarheid vir bovermelde kategorieë bewoners te verseker, op die eienaar van die bewoonde eiendom, die staat of die bewoner van die woning rus.

Die verhandeling oorweeg die betekenis van "bewoonbaarheid" in die samehang van elke kategorie bewoner, ten einde te bepaal wanneer 'n woning as bewoonbaar beskou kan word. Betreffende huurders, bevind hierdie verhandeling dat bewoonbaarheid ingevolge die gemenerereg gebaseer is op die uitgangspunt dat 'n woning geskik moet wees vir die oogmerk waarvoor dit verhuur is. Wanneer die Wysigingswet op Huurbehuising 35 van 2014 egter van krag word, blyk dit dat die vereiste dat huurbehuising geskik moet wees vir hul huuroogmerk, vervang gaan word met 'n bewoonbaarheidsvereiste. Volgens die Wysigingswet impliseer die bewoonbaarheidsvereiste dat die woning veilig en geskik moet wees om in te woon. Verder moet die woning ruim genoeg wees, beskerming bied teen die elemente en teen ander gesondheidsgevaar, die huurder se huishouding en gaste se fisiese veiligheid waarborg en moet dit struktureel volstaan. In die samehang van vruggebruik is 'n woning bewoonbaar indien dit geskik is vir menslike bewoning. Die woning moet sonder defekte en geskik wees vir bewoning. In die samehang van okkupeerders word bewoonbaarheid ingelees onder grondwetlike regte soos geskikte behuising, verblyfsekerheid en menswaardigheid. In hierdie verband is 'n woning bewoonbaar vir okkupeerders ingevolge die Wet op die Uitbreiding van Verblyfsekerheid 62 van 1997 (voorts op die Engelse akroniem "ESTA") indien okkupeerders woonagtig is in wonings wat verblyfsekerheid bied en in lyn met die standarde van menswaardigheid is.

Wat betref die vraag oor wie die regsplig dra om bewoonbaarheid te verseker, bevind hierdie verhandeling dat die eienaar van die eiendom hierdie plig dra in die geval van huurbehuising en wonings onder vruggebruik. Wat okkupeerders betref is dit nie duidelik wie die bewoonbaarheid van die woning moet verseker nie. Die argument word gemaak dat die plig om bewoonbaarheid te verseker hoofsaaklik op

die eienaar rus, siende dat die eienaar ingevolge artikel 25(6) van die Grondwet deur ESTA verplig word om 'n okkuperder op sy of haar eiendom te akkommodeer. Waar dit egter onredelik sou wees om van die eienaar te verwag om bewoonbaarheid te verseker, byvoorbeeld weens finansiële druk of 'n tekort aan hulpbronne, moet die staat beroep word om bewoonbare omstandighede vir okkuperders teweeg te bring.

Die gevolgtrekking in hierdie verhandeling is dat daar nie tans 'n gemeenskaplike standaard tussen al drie kategorieë van bewoning in ons reg bestaan nie. Dit is omdat die huidige kategorieë se onderskeie eienskappe so eiesoortig is dat 'n gemeenskaplike standaard van bewoonbaarheid nie in al drie kontekste sal werk nie. Die verhandeling voer wel aan dat die Grondwet die bron is vir 'n uiteindelijke minimum gemeenskaplike standaard wat die basislyn vir al drie kategorieë van bewoning vorm. Dit is so omdat die Grondwet in al drie kategorieë toepassing vind. Gevolglik moet daar op die minste een of ander standaard van bewoonbaarheid nagekom word, wat deur die Grondwet ingelig word en waaraan elke kategorie inwoners moet voldoen.

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The views or opinions expressed in this dissertation should not be attributed to any of the above-mentioned persons or institutions, but I am nevertheless grateful for their consistent assistance and endless support. I take full responsibility for any remaining errors or shortcomings that may be contained in this dissertation.



## LIST OF ABBREVIATIONS

DPT	Declaration on the Principles of Tolerance
DRA	Deed Registries Act 47 of 1937
ESTA	Extension of Security of Tenure Act 62 of 1997
HA	Housing Act 107 of 1997
HCPMA	Housing Consumer Protection Measures Act 95 of 1998
ICESCR	International Covenant on Economic, Social and Cultural Rights
NHBRC	National Home Builders Registration Council
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
RHA	Rental Housing Act 50 of 1999
RHAA	Rental Housing Amendment Act 35 of 2014
SARCPL	South African Research Chair in Property Law
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WHO	World Health Organisation

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## CHAPTER 1: INTRODUCTION

### 1 1 Introduction to the research problem

Tenants,<sup>1</sup> usufructuaries<sup>2</sup> and occupiers<sup>3</sup> are all categories of inhabitants that occupy property belonging to another. The condition and maintenance of the dwelling that

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<sup>1</sup> Section 1 of the Rental Housing Act 50 of 1999 (“RHA”) defines a tenant as “the lessee of a dwelling which is leased by a landlord”. See generally, G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman’s The Law of Property* 6 ed (2019) 509; C Visser, JT Pretorius, R Sharrock & M van Jaarsveld *Gibson South African Mercantile and Company Law* 8 ed (2003) 171-172; S Viljoen *The Law of Landlord and Tenant* (2016) 42; R Sharrock *Business Transactions Law* 8 ed (2011) 310; G Glover *Kerr’s Law of Sale and Lease* 4 ed (2014) 329.

<sup>2</sup> A usufruct relationship gives rise to the following: an owner gives the usufructuary the right to the full use and enjoyment of a dwelling in such a way that the dwelling is not destroyed through such use and enjoyment on its return to the owner. See generally AJ van der Walt *The Law of Servitudes* (2016) 464; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris (eds) *The Law of South Africa* 24 2 ed (2010) para 581; RP Pace “Usufruct” in RP Pace & WM van der Westhuizen (eds) *Wills and Trusts* (Sl: 21 1995) para 68.1; CG van der Merwe & MJ de Waal *The Law of Things and Servitudes* (1993) 210; Muller et al *Silberberg and Schoeman’s The Law of Property* 383; CG van der Merwe & A Pope “Servitudes and Other Real Rights” in F du Bois (ed) *Willie’s Principles of South African Law* 9 ed (2007) 591 604; MM Corbett “Usufruct, Usus and Habitatio” in HR Hahlo MM Corbett, G Hofmeyr & E Kahn (eds) *The Law of Succession in South Africa* 2 ed (2001) 366 366; MJ de Waal “Servitudes” in R Zimmermann & D Visser (eds) *Southern Cross Civil Law and Common Law in South Africa* (1996) 785 809-810.

<sup>3</sup> Section 1 of ESTA provides that an occupier means:

“a person who resides on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so but excluding a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and a person who has an income in excess of the prescribed amount”.

See generally JM Pienaar *Land Reform* (2014) 302; A Mahomed, P Benjamin, B Barry, S Magardie, P Naidoo, N Yazbek, M Mokhoaetsi, J Ntuli & V Mngwengwe “Tenure Security in SA Law” in A Mohamed (ed) *Land Tenure Law* (RS: 1 2013) 2-3; H Mostert, JM Pienaar & J van Wyk “Land Reform” in WA Joubert & JA Faris (eds) *The Law of South Africa* 14 2 ed Part 1 (2010) para 127; Sharrock *Business Transactions Law* 885; JM Pienaar & J Brickhill “Land” in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 3 2 ed (RS: 6 2014) 48-29; Muller et al *Silberberg and Schoeman’s The Law of Property* 701; TE Scheepers & W du Plessis “Extension of Security of Tenure Act – A Bone of Contention” (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 473 474; T

these inhabitants occupy are ordinarily seen to be the responsibility of the landowners that make the properties available for occupation.<sup>4</sup> However, this responsibility is not equally clear in all cases, and this issue forms the crux of the research in this dissertation. A pertinent question that may arise in these contexts is whether there is a common (or, at the very least, a minimum) standard of habitability for these types of inhabitants, and on whom the obligation rests to ensure such a standard of habitability for these dwellings. If the dwellings are not in a habitable state, tenants, usufructuaries and occupiers are arguably confronted with two equally unsatisfactory alternatives, namely: (1) homelessness, if they choose to vacate the uninhabitable dwellings; or (2) continue to live in a dwelling that is an unsafe, undignified and inadequate building for which they may or may not be paying rent, depending on the particular relationship.<sup>5</sup> In this regard, tenants ordinarily pay rent for the dwellings they inhabit, while usufructuaries and occupiers, in most cases, do not.<sup>6</sup>

To determine whether dwellings are habitable, the meaning of “habitability” needs to be assessed. In this regard, there are various rights that tenants, usufructuaries and

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Mbhense “Does ESTA still Protect Occupiers of Farm Land in South Africa?” (2014) *De Rebus* 22 23; *Landbou Navorsingsraad v Klaasen* (LCC83R/01) [2001] ZALCC 43 (29 October 2001) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2001/43.html>> para 21; *Kiepersol Poultry Farm (Pty) Ltd v Phasiya* 2010 3 SA 152 (SCA) para 7; *Nhlabathi v Fick* [2003] ZALCC 9 (8 April 2003) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2003/9.html>> para 12; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> para 17; *Kusa Kusa CC v Mbele* (LCC39/02) [2002] ZALCC 58 (20 November 2002) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2002/58.html>> para 8; *Molusi v Voges* NO 2016 3 SA 370 (CC) para 4, particularly footnote 6; *Nkosi v Bührmann* 2002 1 SA 372 (SCA) para 20; *Dlamini v Joosten* 2006 3 All SA 1 (SCA) para 1, especially footnote 3.

<sup>4</sup> *Mpange v Sithole* 2007 6 SA 578 (W); *Daniels v Scribante* 2017 4 SA 341 (CC).

<sup>5</sup> *Mpange v Sithole* 2007 6 SA 578 (W) para 1; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 32 and 52; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> paras 8-9 and 12-14; W du Plessis, JM Pienaar & N Olivier “Land Matters: New Developments 2007(2)” (2007) 22 *South African Public Law* 548 570.

<sup>6</sup> Usufructuaries ordinarily do not pay rent (or some form of equivalent) because they are generally granted the usufruct to derive an income or enjoy benefits from the property belonging to another. Whether occupiers will pay rent will depend on the consent to occupy the dwelling given by the owner or person in charge.

occupiers are entitled to at the commencement of their occupation.<sup>7</sup> One of these rights is the right to use and enjoy the dwelling, which the landowner promises to give temporarily, in respect of tenants.<sup>8</sup> Likewise, in the case of usufructuaries, the landowner also gives the usufructuary the right to use and enjoy the dwelling.<sup>9</sup> In the context of occupiers, the landowner equally promises the occupier, in terms of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”), the right to reside on and use the dwelling that is subject to the occupier-owner relationship.<sup>10</sup>

Tenure security is another potential element of habitability. Traditionally, there are many ways in which people may enjoy tenure in South African law (some of which are illustrated by the categories of inhabitants arising specifically in the context of this dissertation), namely lease, servitudes, and statutory tenure in terms of ESTA.<sup>11</sup> For the most part, the tenure security of tenants is regulated by the terms of the lease agreement,<sup>12</sup> while the tenure of usufructuaries is secured and regulated by the terms

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<sup>7</sup> *Mpange v Sithole* 2007 6 SA 578 (W) para 28; *Daniels v Scribante* 2017 4 SA 341 (CC) para 26; Muller et al *Silberberg and Schoeman’s The Law of Property* 383-384.

<sup>8</sup> Glover *Kerr’s Law of Sale and Lease* 342-352; Viljoen *The Law of Landlord and Tenant* 139; Muller et al *Silberberg and Schoeman’s The Law of Property* 509; *Mpange v Sithole* 2007 6 SA 578 (W) para 28; *Poynton v Cran* 1910 AD 205 221; Pretorius, Sharrock & Van Jaarsveld *Gibson South African Mercantile and Company Law* 174; K Lehmann “Letting and Hiring of Property” in F du Bois (ed) *Willie’s Principles of South African Law* 9 ed (2007) 906 907; C Hugo & P Simpson “Lease” in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective Property and Obligations in Scotland and South Africa* (2005) 302 331; AJ Kerr & G Glover “Lease” in WA Joubert & JA Faris (eds) *The Law of South Africa* 2 ed (2007) para 2.

<sup>9</sup> Van der Walt *The Law of Servitudes* 464-471; Corbett “Usufruct, Usus and Habitatio” in *The Law of Succession in South Africa* 366, 373; Van der Merwe & De Waal “Servitudes” in *The Law of South Africa* paras 581 and 585; RP Pace “Usufruct” in RP Pace & WM van der Westhuizen (eds) *Wills and Trusts* (1995) para 68.1; Van der Merwe & De Waal *The Law of Things and Servitudes* 210-212; De Waal “Servitudes” in *Southern Cross Civil Law and Common Law in South Africa* 810-813; Muller et al *Silberberg and Schoeman’s The Law of Property* 383-384; Van der Merwe & Pope “Servitudes and Other Real Rights” in *Willie’s Principles of South African Law* 604-608.

<sup>10</sup> Section 6(1) of ESTA. See further Mahomed et al “Tenure Security in SA Law” in *Land Tenure Law* 2-11 – 2-12; Mostert, Pienaar & Van Wyk “Land Reform” in *LAWSA* para 134.

<sup>11</sup> Mahomed et al “Tenure Security in SA Law” in *Land Tenure Law* 2-2.

<sup>12</sup> *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) para 28; Viljoen *The Law of Landlord and Tenant* 156; Mahomed et al “Tenure Security in SA Law” in *Land Tenure Law* 2-2.



of the usufruct agreement.<sup>13</sup> The tenure security of occupiers is in turn regulated by ESTA.<sup>14</sup> Habitability may also encompass the right of the inhabitant to make improvements. Tenants, usufructuaries and occupiers are entitled to the right to make improvements in terms of the common law and statutory law to protect and preserve the dwelling to make it habitable.<sup>15</sup> The purpose for mentioning the entitlements that ordinarily go with these categories of inhabitants is to show that they give rise to certain responsibilities on the part of landowners immediately when the respective owners provide the tenants, usufructuaries and occupiers permission to stay in the dwelling. Consequently, these could be measures that may be used to hold landowners accountable to keep the dwelling habitable.

An owner could also be held liable to ensure the habitability of dwellings inhabited by tenants, usufructuaries and occupiers in terms of the Constitution of the Republic of South Africa, 1996 ("Constitution"), as shown in the various chapters dealing with these categories of inhabitants. In this regard, the courts have linked habitability with constitutional rights such as human dignity. The link between habitability and the right to human dignity may indicate a constitutional standard of habitability for tenants, usufructuaries and occupiers in South African law. The link between habitability and human dignity could be used as a constitutional imperative by these categories of inhabitants to hold landowners liable for failure, refusal or neglect to maintain a dwelling in a habitable condition. Holding the landowner responsible for providing habitable dwellings may also be informed by the International Covenant on Economic, Social and Cultural Rights ("ICESCR").<sup>16</sup> The United Nations Committee on Economic

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<sup>13</sup> Van der Walt *The Law of Servitudes* 483-484; Mahomed et al "Tenure Security in SA Law" in *Land Tenure Law* 2-2; Van der Merwe & De Waal "Servitudes" in *LAWSA* para 599; Van der Merwe & De Waal *The Law of Things and Servitudes* 216; De Waal "Servitudes" in *Southern Cross Civil Law and Common Law in South Africa* 810-813.

<sup>14</sup> Section 6(2)(a) of ESTA.

<sup>15</sup> *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 175-176; *Wait v Estate Wait* 1930 CPD 1 4; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 340; Corbett "Usufruct, Usus and Habitatio" *The Law of Succession in South Africa* 2 ed (2001) 376-377; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 59-60.

<sup>16</sup> (Adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3. As at 18 July 2015, the ICESCR has been ratified by 164 countries. South Africa signed the ICESCR on 4 October 1994 and ratified it on 12 January 2015. According to art 27 of the ICESCR, it entered into force three months after the South African government deposited its instrument of ratification on 12 January 2015.



Social and Cultural Rights (“CESCR”), particularly the CESCR’s General Comment 4,<sup>17</sup> indicates a standard of habitability that should be provided to occupants of residential properties. More importantly, the CESCR’s General Comment 4 emphasises the link that exists between adequate housing and human dignity and uses the requirement of habitability as a tool to promote living conditions that are habitable, safe, secure and dignified for inhabitants.<sup>18</sup> Therefore, these categories of inhabitants may rely on the Constitution and international law as permitted by section 39(1)(b) of the Constitution to hold the landowner liable for habitability, provided that such an obligation does in fact rest on the landowner as will be questioned in chapters 3, 4 and 5 of the dissertation.

Based on the above brief introduction, this dissertation will consider the extent to which these rights of certain occupants, or the imperatives driven by the Constitution and international law, point towards a common (or minimum) standard of habitability for tenants, usufructuaries and occupiers. Furthermore, the study will investigate the general principles of habitability and provide a comparison of the entitlement of use and enjoyment, security of tenure and the entitlement to make basic improvements to property across the three categories. The reason for this study is to determine the content and scope of habitability regarding each category of inhabitant. Moreover, it will also consider whether the obligation to ensure the standard of habitability rests on the landowner or the state or even the particular inhabitant. This will be especially important in instances where a landowner has failed to maintain and keep the dwelling in a habitable condition and it becomes necessary to ensure that occupants live in dignified and habitable dwellings.

## **1 2 Research aims and hypotheses**

The dissertation aims to provide a comparison between tenants, usufructuaries and occupiers as potential inhabitants of property belonging to another. Moreover, the dissertation aims to determine whether a common or, more importantly, a minimum, standard of habitability exists for tenants, usufructuaries and occupiers in South African law. Crucially, it needs to be determined whether a common standard of

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<sup>17</sup> CESCR’s General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/1992/23.

<sup>18</sup> Paras 7-8.

habitability for these categories of inhabitants in South African law can be derived from the Constitution. In this respect, it is important to consider whether the obligation to ensure habitability for tenants, usufructuaries and occupiers rests on the owner of the property, or the state, or even the respective inhabitant of the dwelling. Finally, if a minimum standard of habitability is not present in one (or all) of these categories of inhabitants, the dissertation will ultimately determine whether the absence of such a minimum standard of habitability is (un)constitutional. If unconstitutionality exists because a particular category of inhabitant's dwelling does not comply with a minimum standard of habitability, it will be necessary to determine the best approach going forward for South African law relating to habitability in each category of inhabitant.

The dissertation has six hypotheses as points of departure. Firstly, there seem to be noteworthy similarities and differences between tenants, usufructuaries and occupiers as inhabitants of property belonging to another. This may eventually impact on the standard of habitability that can be expected in the respective categories. Secondly, the fact that all these categories of inhabitants are entitled to the use and enjoyment of a dwelling belonging to the owner seems to initially imply a minimum standard of habitability. Thirdly, there should be a common standard of habitability between tenants, usufructuaries and occupiers because the standard should arguably be evaluated within the context of the Constitution (especially section 10, which provides that everyone has the right to human dignity). A link (in the context of tenants and occupiers for instance) presumably exists between habitability and human dignity. In this regard, human dignity can be used as the basis to advocate for a common standard of habitability. Fourthly, the obligation to ensure habitability in the context of tenants and usufructuaries rests on the owner. In the case of occupiers, there is uncertainty in respect of the balancing of rights. It is also not clear in terms of the obligations owed to individuals by the owner or the state concerning a basic standard of habitability. In the fifth place, it is assumed that the obligation to ensure habitability rests on the owner or the state in so far as it ensures the promotion of safe and suitable living conditions for tenants, usufructuaries and occupiers. Finally, a minimum standard of habitability seems to exist for tenants, but not overtly for usufructuaries and occupiers. Thus, a lack of a minimum standard of habitability applicable to all these types of inhabitants seems to point towards unconstitutionality as a minimum standard should arguably be derived from the Constitution to apply to *all* three categories of inhabitants.

### 1 3 Methodology

The research on the comparison between tenants, usufructuaries and occupiers is mainly based on the study and analysis of literature in this field, such as textbooks, legislation, case law and journal articles. To determine whether a common standard of habitability can be derived from the Constitution, a constitutional analysis will be undertaken to explain the implications of the Constitution for the notion of habitability. This will be done to provide a foundation for further analysis of the impact of the Constitution in the different categories of inhabitants dealt with in this dissertation. Moreover, the analysis will enable an overall assessment of whether the law imposes the obligation to ensure habitability on the owner or the state, or even the inhabitant in some (or all) instances. To research whether a minimum standard of habitability exists in one (or all) of these categories of inhabitants, and to ultimately make a pronouncement about the (un)constitutionality of such a state of affairs, it will be necessary to fully investigate the impact of the Constitution. This will enable the determination of the best approach for South African law going forward regarding the standard of habitability that can be expected in the context of various residential dwellings. It should be noted that this dissertation will focus primarily on South African law and the extent to which South African law recognises a minimum (or common) standard of habitability between a number of categories of inhabitants. The dissertation will also rely on international law relating to the notion of habitability. Reliance on international law will be done to the extent to which this source of law points towards a minimum (or common) standard of habitability between the categories of comparison. The choice for relying on international law as it pertains to standards of habitability for the types of inhabitants being investigated is because the Constitution creates a mandate that, in the interpretation of the Bill of Rights, courts or tribunals must consider international law.<sup>19</sup> As such, international law can be used as an effective guide in the interpretation of certain rights such as human dignity, security of tenure and access to adequate housing.<sup>20</sup>

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<sup>19</sup> See chapter 2 part 2 4 below.

<sup>20</sup> See chapter 2 part 2 4 below.

## **1 4 Qualifications**

The dissertation is confined to the determination of whether a common or minimum standard of habitability exists for tenants, usufructuaries and occupiers in South African law, and on whom the obligation rests to ensure the habitability of the dwellings occupied by these inhabitants. Therefore, the dissertation will consider examples from case law limited to dwellings used for residential purposes. The dissertation will not attempt to discuss all the cases that deal with habitability but focuses only on case law that speaks directly to, or is relevant to, the notion of habitability and the obligation to ensure habitability. The selected case law provides a framework for the meaning of habitability in the particular contexts. The examples from case law also indicate on whom the obligation to ensure that the property is habitable rests (whether the occupier, an owner or the state). The chosen case law further presents the impact of the Constitution and international law on the standard of habitability, and how conflicting interests or rights should be balanced when a dwelling should be brought to a habitable condition (for example, in the context of occupiers). More importantly, the case law shows what minimum standard should be expected of a habitable dwelling in each context of inhabitants.

As a start to this dissertation, chapter 2 considers the notion of habitability as given meaning to by the elements of habitability. This chapter further provides the meaning of habitability as conceptualised (generally or in particular contexts) in case law, the Constitution and international law in South Africa. The chapter does not look at the historical origins of the concept of habitability since it is assumed that habitability in South Africa is a constitutional issue. However, it will be necessary to first undertake an analysis on habitability in the common law (regulating usufructuaries and tenants) and statute law (regulating occupiers and tenants). Finally, it will be essential to investigate the impact of the Constitution and international law on a standard of habitability and the extent to which the Constitution and international law point towards a common or minimum standard of habitability.

The dissertation includes a comparison of categories of inhabitants in chapter 3, 4 and 5. The selected categories of inhabitants are tenants, usufructuaries and occupiers. The most important reason why these three categories of comparison were chosen is the fact that they range from those heavily protected by constitutional provisions (for instance, occupiers) to those only protected in terms of the common

law (such as *usufructus*). Some tenants are subject to the common law and statute and fall in a middle category in respect of the protection afforded. Therefore, the categories were not a random selection but were carefully thought out. It is arguably necessary to have *this* type of spectrum of inhabitants to try and see whether, even at the common-law end of the spectrum, one can ensure a certain minimum level of habitability (as potentially still derived from the Constitution). Likewise, one expects a minimum standard of habitability in the context of occupiers where constitutional rights are directly at stake. However, it is not so self-evident in the context of common law servitude relationships. As such, the research aims to show that, at the very least, a standard of habitability should be ensured in the common-law construct of a usufruct.

## **1 5 Chapter outline**

This dissertation consists of six chapters of which this chapter serves as the introductory one outlining the main aims, research questions, assumptions, and the methodology that the dissertation will follow. Chapter 2 examines a conceptual legal meaning of habitability. To do this, the first section of the chapter commences with an evaluation of the elements of habitability. The purpose of this enquiry is to find out how these elements provide impetus to a better understanding of the meaning to the notion of habitability and what may be considered a general minimum required standard of habitability of a dwelling. The second part of chapter 2 proceeds with an investigation of the impact of the Constitution on the standard of habitability. In this regard, the section will provide an overview of the interpretation clause; human dignity as a constitutional value; human dignity as a constitutional right; the right to security of tenure; and, the right to access to adequate housing. The third and final section of chapter 2 will address the extent to which international law impacts on the standard of habitability that can be expected of dwellings. An interesting consideration in this context is the impact of the ICESCR and CESCR's General Comment 4 on the meaning of habitability. This section will provide an overview of the CESCR's General Comment 4 relating to the right to adequate housing (article 11(1) of the ICESCR).

Chapter 3 of the dissertation addresses habitability in the context of tenants. The first segment of the chapter considers the meaning of habitability in order to determine whether a minimum standard of habitability is required for tenants. After that, the chapter examines the impact of the Constitution on the standard of habitability for

tenants considering the right to access to adequate housing and human dignity. The third part of chapter 3 investigates on whom the obligation to ensure habitability rests – more specifically, whether such an obligation is on the landowner, the state, or the tenant in the landowner-tenant relationship.

Chapter 4, in turn, proceeds to deal with the notion of habitability when it comes to usufructuaries. The first part of the chapter looks specifically at the meaning of habitability in the context of usufructuaries. In addition to that, this part of chapter 4 determines whether the owner can be expected to give usufructuaries more entitlements or rights in light of the requirement of habitability. The reason for this enquiry is to draw conclusions about whether a minimum standard of habitability exists for usufructuaries that can potentially be equated with other categories, like occupiers and/or tenants. The second section of chapter 4 then scrutinises the impact of the Constitution on the standard of habitability for usufructuaries considering constitutional rights (or imperatives) outlined in chapter 2. The third segment of chapter 4 will explore on whom the obligation rests to ensure habitability, more specifically whether the obligation is on the owner who grants the usufruct, the state, or the occupier in the owner-usufructuary relationship.

In chapter 5, the dissertation continues to investigate the concept of habitability, but this time in the case of occupiers. To undertake this investigation, the first part of the chapter discusses the meaning of habitability when dwellings are occupied by occupiers for purposes of ESTA. Furthermore, it questions whether there is a minimum standard of habitability for occupiers, specifically in terms of ESTA and cases that have worked towards developing the notion. The second segment of chapter 5 scrutinises the impact of the Constitution on the standard of habitability for occupiers. Here, the focus will be on the right to security of tenure (in terms of section 25(6)) and human dignity (in terms of section 10). It should be mentioned that the right to human dignity in the context of occupiers is reinforced by section 5 of ESTA. The final part of chapter 5 explores the question of whether the landowner, the occupier, or the state must ensure a level of habitability for occupiers' dwellings.

Chapter 6 concludes the dissertation and draws conclusions from each of the chapters dealing with the categories of comparison. The foundational question that emerges in this chapter is whether there can be a minimum (or common) standard, or whether each category is so individual that requiring a common standard cannot be expected in all three contexts. The final chapter of the dissertation will aim to determine

whether, at the very least, a minimum standard of habitability for tenants, usufructuaries and occupiers in South African law can be derived from the Constitution. If such a minimum standard is not present in one (or all) of these categories of inhabitants, the chapter will attempt to ultimately make a pronouncement about the (un)constitutionality of such a state of affairs. Furthermore, if unconstitutionality exists because a particular category of inhabitant has not provided a minimum standard of habitability, it will be necessary to determine the best approach for South African law going forward.



## CHAPTER 2: CONCEPTUALISING THE LEGAL MEANING OF HABITABILITY

### 2 1 Introduction

In South Africa, neither the common law nor statutory law, provide for a uniform definition of habitability that applies to dwellings inhabited by tenants, usufructuaries and occupiers.<sup>1</sup> However, generally speaking, the legal concept of habitability seems to display elaborative elements such as adequate space, protection from elements and other threats to the health and physical safety of occupants, and a structurally undamaged dwelling.<sup>2</sup> Therefore, from a legal perspective, habitability arguably represents a dwelling that is physically safe and suitable to inhabit.<sup>3</sup> In this regard, the sources that seem to provide some explanation of the concept of habitability in South African law are pronouncements of the notion in case law,<sup>4</sup> the Constitution of the Republic of South Africa, 1996 (“Constitution”),<sup>5</sup> the International Covenant on

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<sup>1</sup> See, for example in context, the RHA, the Deeds Registries Act 47 1937 (“DRA”), the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”), ESTA and the Housing Act 107 of 1997 (“HA”).

<sup>2</sup> Rental Housing Amendment Act 35 of 2014 (“RHAA”) once the amendment comes into effect; CESCR’s General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8.

<sup>3</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-33; *Mpange v Sithole* 2007 6 SA 578 (W) para 28; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 20; *Alexander v Armstrong* 1879 9 Buch 233 SC 234; *Tee v Mcilwraith* 1905 19 ECD 282 286; *Cape Town Municipality v Paine* 1923 AD 207 226; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 52; *Brunsdon’s Estate v Brunsdon’s Estate* 1920 CPD 159 174.

<sup>4</sup> See specifically *Alexander v Armstrong* 1879 9 Buch 233 SC; *Stewart & Co v Executors of Staines* (1861-1863) 4 Searle 152; *Bensely v Clear* 1878 8 Buch 89; *Tee v Mcilwraith* 1905 19 ECD 282; *Salmon v Dedlow* 1912 TPD 971; *Mpange v Sithole* 2007 6 SA 578 (W); *Barker v Beckett & Co Ltd* 1911 TPD 151; *Cape Town Municipality v Paine* 1923 AD 207; *Ex Parte De Douallier* 1907 24 SC 282; *Amin v Ebrahim* 1926 47 NPD 1; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA); *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC); *Daniels v Scribante* 2017 4 SA 341 (CC); *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>>.

<sup>5</sup> Section 26(1) of the Constitution; underpinned by section 152(1)(d) of the Constitution.



Economic, Social and Cultural Rights (“ICESCR”)<sup>6</sup> and the United Nations Committee on Economic Social and Cultural Rights (“CESCR”) General Comment 4. Pronouncements in case law, the Constitution and the CESCR’s General Comment 4 as sources of the law point towards a conceptual understanding of habitability.

South African courts have made a number of judgments in which a conceptual understanding of habitability is reflected.<sup>7</sup> In this regard, courts have linked habitability to constitutional rights to give effect to the right to a habitable dwelling.<sup>8</sup> In other instances, courts have invoked the CESCR’s General Comment 4 in order to provide an understanding of the meaning of habitability.<sup>9</sup> In *Mpange v Sithole* (“*Mpange*”),<sup>10</sup> the court referred to the right to use and enjoyment of a dwelling as implying a habitable dwelling that guarantees and protects occupants against threats to life or property.<sup>11</sup> The court in *Mpange* went even further and linked habitability with access to adequate housing and human dignity. This link displayed that access adequate

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<sup>6</sup> The ICESCR was adopted by the General Assembly of the United Nations on 16 December 1966 and came into force on 3 January 1976. As at 18 July 2015, the ICESCR has been ratified by 164 countries. South Africa signed the ICESCR on 4 October 1994 and ratified it on 12 January 2015. According to article 27 of the ICESCR, it entered into force three months after the South African government deposited its instrument of ratification on 12 January 2015.

<sup>7</sup> See, for instance, *Alexander v Armstrong* 1879 9 Buch 233 SC 234; *Tee v Mcilwraith* 1905 19 ECD 282 286; *Ex Parte De Douallier* 1907 24 SC 282 283; *Cape Town Municipality v Paine* 1923 AD 207 226; *Amin v Ebrahim* 1926 47 NPD 1 7; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 52; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 20; *Mpange v Sithole* 2007 6 SA 578 (W) para 51; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 26-32. See further SI Mohamed *Landlord and Tenant – Rights and Obligations* (2019) 42-44; SI Mohamed “Fit to Let Doesn’t Mean Habitable” (10-04-2012) *Daily News* <<http://www.iol.co.za/dailynews/consumer/fit-to-let-doesnt-mean-habitable-1272672>> (accessed 28-02-2018).

<sup>8</sup> See specially *Mpange v Sithole* 2007 6 SA 578 (W) paras 50-55; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 12, 31-34; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <http://www.saflii.org/za/cases/ZALCC/2018/12.html> para 34. See further Mohamed *Landlord and Tenant – Rights and Obligations* 43-44; Mohamed “Fit to Let Doesn’t Mean Habitable” (10-04-2012) *Daily News*.

<sup>9</sup> See particularly *Mpange v Sithole* 2007 6 SA 578 (W) para 51; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 20. See further Mohamed *Landlord and Tenant – Rights and Obligations* 43-44; Mohamed “Fit to Let Doesn’t Mean Habitable” (10-04-2012) *Daily News*.

<sup>10</sup> *Mpange v Sithole* 2007 6 SA 578 (W).

<sup>11</sup> Para 28.

housing in terms of section 26(1) of the Constitution includes habitability,<sup>12</sup> and habitability, in turn, implies living in dignified conditions.<sup>13</sup> Similarly, the court in *Ex Parte De Douallier* (“*De Douallier*”)<sup>14</sup> mentioned that the premises of usufructuaries should be placed in a habitable state of repair.<sup>15</sup> In *Daniels v Scribante* (“*Daniels*”),<sup>16</sup> the court, in turn, found that “reside on and use of” a farm dwelling implies habitability that guarantees occupiers’ secure tenure.<sup>17</sup> The court in *Daniels* went on to link habitability with security of tenure and human dignity.<sup>18</sup> This link implied that secure tenure means making basic improvements that preserve a dwelling in a habitable condition and the living conditions should accord with human dignity.<sup>19</sup>

Despite these leaps taken by the courts, it appears that a conceptualised legal meaning of habitability that will lead to clarity and certainty for claimants wishing to argue for a minimum standard of habitability has not been pronounced yet. Moreover, a universal meaning of “habitability” across different contexts of occupancy has not yet crystallised. This chapter aims to conceptualise a possible legal meaning of habitability in order to canvass a minimum standard of habitability in three categories of rights of residential occupancy in South African law, namely tenants, usufructuaries and occupiers. The questions that come to mind are: does habitability mean to reside on, and/or the use and enjoyment of property? Moreover, does habitability imply a certain level of security of tenure? Furthermore, can we assume that habitability includes the right to make improvements? These questions will be approached from a constitutional perspective, but also considering the prescriptions in the ICESCR and the CESCR’s General Comment 4 as shown below. Arguably, the fact that all these categories of inhabitants are entitled to the use and enjoyment of a dwelling belonging to another implies a minimum standard of habitability. Whether the standard is similar for tenants, usufructuaries and occupiers will, in turn, be investigated in chapters 3, 4, and 5 of the dissertation. It is worth mentioning early on already that the investigation

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<sup>12</sup> Para 51, discussing CESCR’s General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8.

<sup>13</sup> *Mpange v Sithole* 2007 6 SA 578 (W) paras 51-55.

<sup>14</sup> *Ex Parte De Douallier* 1907 24 SC 282.

<sup>15</sup> 283.

<sup>16</sup> *Daniels v Scribante* 2017 4 SA 341 (CC).

<sup>17</sup> Para 32.

<sup>18</sup> Paras 2 and 31-34.

<sup>19</sup> Paras 26-32.

into whether there should be a *common* standard of habitability looks at whether the standard is (or should be) the same across all categories of inhabitants. The enquiry into a *minimum* standard assesses whether all the categories should have a baseline, although the standard in each category may be different.

With this in mind, the first section of this chapter starts by evaluating the elements of habitability. The purpose of this evaluation is to find out how these elements provide greater clarity on the meaning of the notion and what may be considered a general or minimum required standard of habitability.

The second section of the chapter commences with an investigation of the impact of the Constitution on the standard of habitability. It will provide an overview the interpretation clause; of human dignity as a constitutional value; human dignity as a constitutional right; the right to security of tenure; and the right to access to adequate housing. As such, it is assumed that an investigation of the impact of the Constitution on the standard of habitability will show a link between habitability and the right to human dignity, security of tenure and access to adequate housing as enshrined in the Constitution. Moreover, such a link *may* imply a minimum standard of habitability between these categories of inhabitants.

The final section of this chapter will address the extent to which international law impact on the standard of habitability. An interesting consideration in the context of habitability is the impact of the ICESCR and the CESCR's General Comment 4 on the meaning of habitability. This section will provide an overview of article 11(1) of the ICESCR on the right to adequate housing and CESCR's General Comment 4 issued in relation to article 11(1) of the ICESCR.<sup>20</sup> An investigation of the impact of the ICESCR and the CESCR's General Comment 4 on the standard of habitability will arguably point towards a minimum standard of habitability between these categories of inhabitants.

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<sup>20</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8(d).

## 2 2 Elements of habitability

### 2 2 1 Introduction

This section seeks to determine whether there are certain key elements of what makes a dwelling habitable. In other words, it will ask: What does it mean to live in a habitable dwelling; and are there important constituents that make up a “habitable dwelling”? The CESCR’s General Comment 4 sets out the meaning of habitability in relation to the right to adequate housing.<sup>21</sup> Although South Africa is a party to the ICESCR, and should therefore subscribe to this conceptual understanding of habitability, a cursory analysis shows that a definition of habitability as it may be uniformly applicable to tenants, usufructuaries and occupiers is not provided for in legislation or common law in South Africa.<sup>22</sup> Therefore, it is necessary to define the concept from what can arguably be said to constitute elements of habitability.<sup>23</sup> These elements include, *inter alia*, adequate space, protection from the elements and other threats to health, and physical safety of the occupant or a structurally sound building.<sup>24</sup> It is important to consider whether these elements can aid in a conceptual understanding of habitability, especially in so far as it potentially points towards a minimum standard of habitability in general, or in a specific category of inhabitant. Therefore, the section aims to elaborate on the elements of habitability.

### 2 2 2 Adequate space

Adequate space essentially has to do with a dwelling that is suitable to the extent that it has sufficient room (or the area must be equipped) to do the basic things that one needs to do in the dwelling where he or she lives.<sup>25</sup> This would mean that a space

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<sup>21</sup> Para 8.

<sup>22</sup> See, for instance, the RHA, DRA, PIE, ESTA and HA. However, for a definition of habitability relating to tenants, see specifically the RHAA. This definition will only be applicable once the RHAA finally comes into effect.

<sup>23</sup> K Bapela & P Stoop “Unpacking the Rental Housing Amendment Act 35 of 2014” (2016) *De Rebus* 19.

<sup>24</sup> CESCR’s General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/1992/23 para 8 read together with section 1 of RHAA (once it comes into operation).

<sup>25</sup> M Picard, S Russell, K Sutton, T Komino & S Matsuo *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response* 4 ed (2018) 254-255.

becomes *adequate* if it provides its inhabitants with a sufficient area to perform daily household activities such as cooking and eating, sleeping, bathing, washing, dressing, and storing food or water safely and securely.<sup>26</sup> The dwelling must ensure that the space is separated or partitioned with either brick walls, hardboards or curtains for the inhabitant and his family to live in privacy and dignity.<sup>27</sup> A space that does not enable an inhabitant to achieve basic human amenities is arguably inadequate and therefore not suitable and safe to live in. Hence, if habitability entails that the “space must be adequate”, the notion assumes that there is enough room to live in safety, security, privacy and dignity.

### 2 2 3 *Protection from the elements and other threats to health*

To be protected against “the elements” means that an inhabitant of a dwelling must be protected from cold, damp, heat, rain, or wind.<sup>28</sup> Protection against the elements has to do with the physical structure of the dwelling. The structure should be able to warrant against weather conditions. An inhabitant must also enjoy protection from other threats to health. This means that an inhabitant must not inhabit a dwelling that poses serious harm or danger to his or her health. For example, the ceiling of a dwelling should be repaired or replaced if the ceiling is dilapidated and contains asbestos that might pose a danger to one’s health. It is thus obligatory for landowners who provide housing for others to warrant that inhabitants shall not be exposed to unnecessary risk to life or property as a result of the above-mentioned elements.<sup>29</sup> This underscores the fact that housing is a fundamental right of citizens in which they are guaranteed to be protected from the elements and other threats to health in their homes.<sup>30</sup> Hohmann argues that a safe and secure house protects people from the elements and provides refuge from external factors. She further asserts that a house gives people a foundation from which

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<sup>26</sup> 254-255; T Rapelang *An Evaluation of the Right to “Access to Adequate Housing” in Joe Morolong Local Municipality, South Africa* LLM thesis, University of the Free State (2013) 97.

<sup>27</sup> Picard et al *The Sphere Handbook* 255.

<sup>28</sup> See generally CESCR’s General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/1992/23 para 8(d).

<sup>29</sup> *Mpange v Sithole* 2007 6 SA 578 (W) para 28; *Amin v Ebrahim* 1926 NPD 1 7.

<sup>30</sup> Section 26 of the Constitution; NL Newmark & PJ Thompson *Self, Space & Shelter: An Introduction to Housing* (1977) 11.

they can build a livelihood.<sup>31</sup> Landman, in turn, states that a dwelling is more than a mere shelter or physical structure; it should at the very least protect its inhabitants from the elements and threats to health.<sup>32</sup> Accordingly, habitability not only requires adequate space as defined above but it further entails dwellings that should protect against the elements and threats to health.

#### 2 2 4 *Physical safety of the occupant*

Physical safety relates to the physical condition of the dwelling. A dwelling is physically safe if the security of the occupant is guaranteed. This would mean that the occupant must be protected against violence, theft, exposure to weapons and harsh environmental factors.<sup>33</sup> In this regard, it may be appropriate, for instance, to install alarm systems, burglar bars, and erect a fence or wall.<sup>34</sup> Moreover, the windows and doors should not be broken. At this juncture, it is pertinent to point out that “protection from the elements and other threats to health” and the “physical safety of occupants” may seem to constitute the same thing because both relate to physical safety of the inhabitant. However, to be physically safe in a dwelling means to be protected from conduct occasioned by people and harsh environmental factors intruding or potentially intruding on the dwelling, and to be protected against the elements and other threats to health means to be shielded from excessive weather conditions and a state of disrepair of the structure that might affect one’s health. It should be noted that there may be an overlap between protection from the elements and physical safety. As such, there should be a principled distinction between the two elements.

A dwelling is understood not just to be a shelter giving physical protection or safety but it is “a zone of personal intimacy and family security”.<sup>35</sup> As the United Nations Housing Rights Programme notes:

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<sup>31</sup> J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 4.

<sup>32</sup> K Landman *Stronghold, Shelter or Shack: Reconsidering the Nature of Sustainable Housing in South Africa* (2005) unpublished paper delivered at the *Fourth Conference on Sustainable Built Environments (SBE2005): Enabling Frameworks for Sustainability* at Pretoria, 22-24/06/2005 (copy on file with author).

<sup>33</sup> See *Tee v Mcllwraith* 1905 19 ECD 282 286; *Mpange v Sithole* 2007 6 SA 578 (W) para 28.

<sup>34</sup> P Stoop “The Law of Lease” (2014) *Annual Survey of South African Law* 811.

<sup>35</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17. See also Newmark & Thompson *Self, Space & Shelter* 8-9; Rapelang *An Evaluation of the Right to “Access to Adequate Housing”* 1.

“[t]o live in a place, and to have established one’s own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home ...”<sup>36</sup>

Thus to have a habitable home is essential because a home satisfies many human needs like security and safety.<sup>37</sup> In support of this idea, Newmark and Thompson state that a house is a shell of family security and safety for its occupants. It shields them from the outside world and hence makes them feel safe and their possessions safeguarded.<sup>38</sup> Correspondingly, Hartman points out that a house has a special character in that it forms a central setting of one’s personal and family life thus supporting the fact that people need to enjoy physical safety in their houses.<sup>39</sup> In light of the above, it seems clear that safety and security are intrinsically linked to having a habitable home. It arguably, therefore, constitutes an essential element of what is considered a habitable space.

### 2 2 5 A structurally sound building

A dwelling is structurally sound if it is adequately built and its condition is fit and suitable for human habitation. A building is arguably habitable if it does not display evidence of defects, damage, deterioration or distress that might impair its structural function or its present habitation and use.<sup>40</sup> In this regard, the words “a structurally sound building” do not mean the building is adequate. Instead, the words “a structurally

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<sup>36</sup> United Nations Housing Rights Programme, Report No 1, “Housing Rights Legislation: Review of International and National Legal Instruments” (2002) 1. See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17; C Hartman “The Case for a Right to Housing” (1998) 9 *Housing Policy Debate* 223 227-228.

<sup>37</sup> Rapelang *An Evaluation of the Right to “Access to Adequate Housing”* 1.

<sup>38</sup> Newmark & Thompson *Self, Space & Shelter* 10.

<sup>39</sup> Hartman (1998) *Housing Policy Debate* 223 230. See also Rapelang *An Evaluation of the Right to “Access to Adequate Housing”* 1.

<sup>40</sup> NK Becker, D Ireland, N Kennedy, R Nathwani, B Ross & W Teron “Professional Engineers Ontario Structural Condition Assessments of Existing Buildings and Designated Structures Guideline” (18-11-2016) <[www.peo.on.ca/index.php/ci\\_id/31399/la\\_id/1.htm](http://www.peo.on.ca/index.php/ci_id/31399/la_id/1.htm)> (accessed 01-10-2020).



sound building” should be construed to mean a structurally *undamaged* building.<sup>41</sup> In other words, there should arguably be no structural damage to a building to render it habitable and for the element of habitability to be complied with. This is important because a structurally undamaged building is ordinarily suitable and safe to inhabit.

The most common structural defects that are often encountered include roofs that are insecurely fitted to walls, which results in leaking; doors that do not correctly fit on door frames; and cracked walls or foundations.<sup>42</sup> This brings to mind the National Home Builders Registration Council (“NHBRC”), which was established in terms of the Housing Consumer Protection Measures Act 95 of 1998 (“HCPMA”).<sup>43</sup> The objects of the NHBRC are, *inter alia*, to keep a record of home builders, oversee the construction of residential premises to make sure that proper building standards are maintained, and to provide a guarantee of services for serious structural defects.<sup>44</sup>

Furthermore, the General Regulations Regarding Housing Consumer Protection Measures (“GRRHCPM”)<sup>45</sup> elaborates on the technical requirements for strength, stability and serviceability. The technical requirements for strength and stability include that a home and any structural element or component must be planned and built to provide strength and stability for the lifetime of the structure. The planning and building of the dwelling must be in accordance with accepted standards of good practice. During the planning and building phase, foundations of the dwelling must be planned and erected to transmit loads from super-structures to soil horizons safely and without

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<sup>41</sup> Becker et al “Professional Engineers Ontario Structural Condition Assessments of Existing Buildings and Designated Structures Guideline” (18-11-2016) *PEO*.

<sup>42</sup> Rapelang *An Evaluation of the Right to “Access to Adequate Housing”* 5; S Khoza *Socio-Economic Rights in South Africa: A Resource Book* (2007) 262. See also Construction Industry Development Board “Construction Quality in South Africa: A Client Perspective a Discussion Document” (29-06-2011) <[www.cidb.org.za](http://www.cidb.org.za)> (10-10-2018).

<sup>43</sup> Sections 1 and 2 of HCPMA. See also Construction Industry Development Board “Construction Quality in South Africa: A Client Perspective a Discussion Document” (29-06-2011) *CIDB* <[www.cidb.org.za](http://www.cidb.org.za)> (10-10-2018).

<sup>44</sup> Section 3 of HCPMA. See also Construction Industry Development Board “Construction Quality in South Africa: A Client Perspective a Discussion Document” (29-06-2011) *CIDB* <[www.cidb.org.za](http://www.cidb.org.za)> (10-10-2018).

<sup>45</sup> General Regulations Regarding Housing Consumer Protection Measures GNR 1406 in GG 20658 of 1 December 1999.



causing excessive movement or distress in the elements which they support.<sup>46</sup> The foundations of the dwelling must be planned and erected to resist differential displacement and to prevent the passage of moisture to the interior of the dwelling. The floors and stairs of the dwelling must be planned and erected to safely carry their own dead loads in addition to any live loads, which they are likely to be subjected to, without undue deformation and distress.<sup>47</sup> The walls of the dwelling must be planned and built to safely withstand any load to which they are likely to be subjected to, without impairing weather tightness and without undue deformation and distress. The roof of the dwelling and its components must be planned and made to safely resist any forces to which they are likely to be subjected to, and without the roof structure becoming detached from its respective supporting structure.<sup>48</sup>

The technical requirements for serviceability, in turn, include that any home and any structural element or component must be durable.<sup>49</sup> The home must also resist water penetration and prevent condensation which may adversely affect the habitability of the dwelling.<sup>50</sup> The home must further be able to withstand any loads to which it may likely be subjected to, without undue deflection and distortion or cracking over the lifetime of the structure. In addition, walls must be planned and built to resist the penetration of water into the interior of the dwelling and roofs must be planned and made to resist rain penetration to avoid the accumulation of rainwater.<sup>51</sup> Accordingly, habitability not only requires adequate space, the protection against the elements and other threats to health, and physical safety of occupants as defined above, but it also encompasses the fact that dwellings should be structurally sound and undamaged.

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<sup>46</sup> General Regulations Regarding Housing Consumer Protection Measures GNR 1406 in GG 20658 of 1 December 1999.

<sup>47</sup> General Regulations Regarding Housing Consumer Protection Measures GNR 1406 in GG 20658 of 1 December 1999.

<sup>48</sup> General Regulations Regarding Housing Consumer Protection Measures GNR 1406 in GG 20658 of 1 December 1999.

<sup>49</sup> General Regulations Regarding Housing Consumer Protection Measures GNR 1406 in GG 20658 of 1 December 1999.

<sup>50</sup> General Regulations Regarding Housing Consumer Protection Measures GNR 1406 in GG 20658 of 1 December 1999.

<sup>51</sup> General Regulations Regarding Housing Consumer Protection Measures GNR 1406 in GG 20658 of 1 December 1999.

## 2 2 6 Concluding remarks

A conceptual legal understanding of habitability as elaborated by the above-discussed elements of habitability shows that a dwelling will arguably exhibit habitability if it meets the minimum standard of adequate space, ensures protection against excessive environmental factors, provides security from conduct that can be potentially caused by individuals or harsh external factors, and is generally a dwelling that has no structural defects. The focus now turns to an evaluation of constitutional provisions such as human dignity, security of tenure, and access to adequate housing. The aim of the section below is to investigate the implications of the Constitution on the standard of habitability. Considering the aim of chapter 2 specifically and the dissertation as a whole, the significance of this is to investigate what habitability means and to assess whether the link between habitability and constitutional rights points towards a minimum or common standard of habitability in general or in the specific category of inhabitant.

## 2 3 Impact of the Constitution on the standard of habitability

### 2 3 1 Introduction

The Constitution is the supreme law of the land; therefore any conduct or law inconsistent with it is unconstitutional, and all constitutional obligations imposed by the Constitution must be fulfilled diligently and without delay.<sup>52</sup> This means that the Bill of Rights has supremacy over any conduct or law and that the Bill of Rights binds the state and its organs, on the one hand, and private landowners (in certain circumstances) on the other, to the extent to which the rights are applicable and taking into consideration the nature and obligation imposed by the rights.<sup>53</sup> However, the Constitution may not directly protect tenants, usufructuaries and occupiers and may also not explicitly require their dwellings to specifically be habitable.

The Constitution does nonetheless support the requirement of habitability by providing that the state should promote a safe and healthy environment for all.<sup>54</sup> This

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<sup>52</sup> Section 2, read with section 237 of the Constitution.

<sup>53</sup> Section 8 of the Constitution.

<sup>54</sup> See section 152(1)(d) of the Constitution. See also G Muller "Proposing a Way to Develop the Substantive Content of the Right of Access to Adequate Housing: An Alternative to the Reasonableness Review Model" (2015) 30 *Southern African Public Law* 71 90.

provision of the Constitution on its own may be insufficient to impose an obligation on the state to promote habitability, unless it is read with other provisions like section 26 of the Constitution.<sup>55</sup> The Constitution also entrenches rights or values in the Bill of Rights ensuring an undeniable promise for social justice and the improvement in the quality of life for all people of South Africa.<sup>56</sup> This is envisioned by the preamble of the Constitution, which states that the Constitution is the supreme law of the Republic and aims to “heal the divisions of the past and establish a society based on democratic values . . . [and] . . . *improve the quality of life of all citizens*”.<sup>57</sup> With that said, South African courts have certainly made considerable strides towards reflecting on (quite explicitly) a standard of habitability with specific reference to the Constitution. As a result, courts have linked habitability with constitutional rights to give effect to the right to a habitable dwelling since habitability as a stand-alone concept or right is not justiciable. In this regard, the rights contained in chapter 2 of the Constitution have a direct impact on habitability. These rights include the right to human dignity,<sup>58</sup> security of tenure,<sup>59</sup> and access to adequate housing.<sup>60</sup>

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<sup>55</sup> Compare P de Vos, W Freedman, D Brand, C Gevers, K Govender, P Lenaghan, D Mailula, N Ntlama, S Sibanda & L Stone “Socio-Economic Rights” in P de Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) 670, discussing *Joseph v City of Johannesburg* 2010 4 SA 55 (CC). In this case, the court used section 152 of the Constitution and other rights to impose an obligation on the state to protect and advance socio-economic rights.

<sup>56</sup> The preamble of the Constitution; section 7(1) of the Constitution.

<sup>57</sup> The preamble of the Constitution (own emphasis added).

<sup>58</sup> Section 10 of the Constitution. This section provides that every person has inherent human dignity, and very importantly, the right to have their human dignity respected and protected.

<sup>59</sup> Section 25(6) of the Constitution. This section stipulates that a person or community whose tenure of land became legally insecure due to past racially discriminatory laws or practices is entitled, to the extent provided for in an Act of Parliament, to either tenure which is legally secure or to comparable redress.

<sup>60</sup> Section 26 of the Constitution. This section affords every person the right to have access to adequate housing. The section also states that the state must take reasonable legislative and other measures, within its available resources, to ensure the progressive realisation of the right to access to adequate housing. The section further specifies that no person may be evicted from their home, or have their home demolished, without a court order made after taking into account all legally relevant circumstances. No legislation may permit arbitrary evictions.

Thus, when considering the state of dwellings, specifically whether they comply with a specific standard of habitability in the constitutional era, it needs to be determined what that standard should be. In this regard, a question that crops up is whether and to what extent that standard is informed by these constitutional rights to human dignity, security of tenure and access to adequate housing. To answer this question, it is important to first assess what these constitutional provisions mean and whether the link between habitability and these constitutional provisions may inform a minimum (or common) standard of habitability. Therefore, the purpose of this section is to unpack and elaborate on these fundamental rights to investigate the impact of the Constitution on the standard of habitability. The dissertation will now deal with section 39 of the Constitution, which provides how the rights in chapter 2 of the Constitution may be interpreted. This discussion is done to show that when interpreting legislation (regulating tenants and occupiers) or the common law (regulating tenants and usufructuaries) in light of the Bill of Rights, such legislation or the common law should be interpreted progressively in a way that gives effect to human dignity, equality and freedom.<sup>61</sup>

### *2 3 2 Interpretation under section 39 of the Constitution*

The Constitution demands that when interpreting the rights in the Bill of Rights the values that underlie an open and democratic society based on human dignity, equality and freedom should be promoted.<sup>62</sup> According to Liebenberg, this serves as confirmation of the mandate the Constitution creates or contains, in the case of section 39, imposed on courts or tribunals to discharge their obligation in promoting the foundational values in the interpretation of rights.<sup>63</sup> The Constitution also signals a *must follow and not to be ignored* value-based interpretation approach of the Bill of

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<sup>61</sup> Section 39(1)(a) of the Constitution. See further *Eskom Holdings Ltd v National Union of Mineworkers* 2012 2 SA 197 (SCA) para 28; *Minister of Safety & Security v Sekhoto* 2011 5 SA 367 (SCA) para 15; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) paras 21-26.

<sup>62</sup> Section 39 (1)(a) of the Constitution.

<sup>63</sup> S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 97-98.

Rights.<sup>64</sup> As Ngcobo J put it in *Matatiele Municipality v President of the Republic of South Africa* (“*Matatiele Municipality*”),<sup>65</sup> “[c]onstitutional provisions *must* be construed purposively and in the light of the Constitution as a whole”.<sup>66</sup>

The Bill of Rights must also be interpreted and understood according to context. This may include a textual interpretation or understanding, in which chapter 2 of the Constitution and the Constitution as a whole are considered. On the other hand, rights must be interpreted and understood in their social and historical context.<sup>67</sup> When looking at the social and historical context, the court must take into account the difficulties associated with the enjoyment of the right in question or the vulnerability of the individual persons.<sup>68</sup> Chaskalson P, in *Soobramoney v Minister of Health, KwaZulu-Natal* (“*Soobramoney*”),<sup>69</sup> described a more comprehensive context in which these rights in the Bill of Rights should be interpreted in the following manner:

“[w]e live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”<sup>70</sup>

Therefore, when interpreting the Bill of Rights one must recognise the present circumstances of tenants, usufructuaries and occupiers coupled with the Constitution’s

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<sup>64</sup> IM Rautenbach “Interpretation” in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (SI: 35 2015) 1A-22 (own emphasis).

<sup>65</sup> *Matatiele Municipality v President of the Republic of South Africa* 2006 5 SA 47 (CC).

<sup>66</sup> Para 36 (own emphasis).

<sup>67</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 22 and 25. See also IM Rautenbach “Introduction to the Bill of Rights” in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (SI: 35 2015) 1A-22; Khoza *Socio-Economic Rights in South Africa* 33.

<sup>68</sup> Khoza *Socio-Economic Rights in South Africa* 33.

<sup>69</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).

<sup>70</sup> Para 8. See further *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 25; *Rates Action Group v City of Cape Town* 2004 5 SA 545 (C) para 99; Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 100; E Cameron *Justice: A Personal Account* (2014) 256; De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 666.

goal towards a society based on democratic values such as human dignity.<sup>71</sup> Thus, if a purposive interpretative approach is followed, it advances a spirit of transformation.<sup>72</sup>

The Constitution further demands that when interpreting legislation (for instance in the context of regulating tenants or occupiers) and developing the common law (as with the regulation of usufructuaries) the spirit, purport and objects of the Bill of Rights should be promoted.<sup>73</sup> This is a compulsory interpretative mandate in terms of which all legislation, the common law and customary law should be interpreted through the prism of the Bill of Rights.<sup>74</sup> This is because our new constitutional order stems from an evolving history in which a switch was made from a society of division, injustice and exclusion of democratic processes into the inclusion of democratic processes and respect for human dignity, equality and freedom for every citizen when the Bill of Rights is interpreted.<sup>75</sup> In the case of *Frazer v ABSA Bank Ltd* (“*Frazer*”)<sup>76</sup> it was confirmed

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<sup>71</sup> *Investigating Directorate: Serious Economic Offenses v Hyundai Motor Distributors (Pty) Ltd; In re: Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) para 21. See further *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 51; DM Davis & K Klare “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *South African Journal on Human Rights* 403 404; P de Vos “Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness” (2001) 17 *South African Journal on Human Rights* 258 268; S Liebenberg “South Africa: Adjudicating Social Rights under a Transformative Constitution” in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 75 78.

<sup>72</sup> *Investigating Directorate: Serious Economic Offenses v Hyundai Motor Distributors (Pty) Ltd; In re: Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) para 21.

<sup>73</sup> Section 39(2) of the Constitution.

<sup>74</sup> *Investigating Directorate: Serious Economic Offenses v Hyundai Motor Distributors (Pty) Ltd; In re: Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) para 21. See further *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 49; *Ahmed v Minister of Home Affairs* 2017 2 SA 417 (WCC) para 17; *Carmichele v Minister of Safety & Security* 2001 4 SA 938 (CC) paras 33 and 39; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 para 31; *Jordaan v City of Tshwane Metropolitan Municipality; City of Tshwane Metropolitan Municipality v New Ventures Consulting & Services (Pty) Limited; Ekurhuleni Metropolitan Municipality v Livanos* 2017 6 SA 287 (CC) para 44; *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) para 115.

<sup>75</sup> *Investigating Directorate: Serious Economic Offenses v Hyundai Motor Distributors (Pty) Ltd; In re: Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) para 21.

<sup>76</sup> *Frazer v ABSA Bank Ltd* 2007 3 SA 484 (CC).



that when interpreting legislation or the common law, the Constitution demands the promotion of the spirit, purport and objects of the Bill of Rights.<sup>77</sup> This is activated when a provision of the legislation (or the common law) under consideration affects constitutional rights.<sup>78</sup>

## 2 3 2 1 Concluding remarks

It may be argued that where constitutional rights of tenants, usufructuaries and occupiers are impacted by a provision in legislation (or the common law) the court may adopt an interpretation of legislation (or the common law) that is in line with the Constitution.<sup>79</sup> This may, however, be done if the interpretation can reasonably be ascribed to the provision in the legislation (or the common law) that regulates these type of inhabitants.<sup>80</sup> In this regard, courts may not avoid interpretations of unconstitutionality. However, the courts may interpret the legislation (or the common law) regulating tenants, usufructuaries and occupiers in light of the Bill of Rights.<sup>81</sup> This may ensure that the legislation (or the common law) regulating these categories

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<sup>77</sup> Para 47.

<sup>78</sup> See *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC) paras 88-90; *Frazer v ABSA Bank Ltd* 2007 3 SA 484 (CC) para 47; DE van Loggerenberg “Excerpts from the Constitution of the Republic of South Africa, 1996” in DE van Loggerenberg & E Bertelsmann (eds) *Erasmus: Superior Court Practice* 2 ed Vol 1 (OS: 6 2015) A1-23A; B Maswazi “The Doctrine of Precedent and the Value of Section 39(2) of the Constitution” (2017) *De Rebus* 28 29.

<sup>79</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 1 SA 545 (CC) para 23; *University of Stellenbosch Legal Aid Clinic v Minister of Justice & Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC) para 135.

<sup>80</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 1 SA 545 (CC) para 23; *University of Stellenbosch Legal Aid Clinic v Minister of Justice & Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC) para 135.

<sup>81</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 1 SA 545 (CC) paras 21-26; *Minister of Safety & Security v Sekhoto* 2011 5 SA 367 (SCA) para 15; *Eskom Holdings Ltd v National Union of Mineworkers* 2012 2 SA 197 (SCA) para 28.

of inhabitants is construed in a manner that promotes the underlying values of that legislation (or the common law).<sup>82</sup> As a result, the interpretation of the legislation (or the common law) governing tenants, usufructuaries and occupiers may not be unduly strained.<sup>83</sup> Thus, a court engaged in an exercise where constitutional rights are affected may prefer an interpretation that gives tenants, usufructuaries and occupiers full protection of their constitutional rights.<sup>84</sup> This may ensure that tenants, usufructuaries and occupiers enjoy exactly what the particular constitutional right guarantees them.<sup>85</sup> In this regard, the court may embrace an interpretation of legislation (or the common law) that promotes constitutional rights and values such as human dignity, equality and freedom.<sup>86</sup> This may be done even if the provision of the legislation (or the common law) relating to tenants, usufructuaries and occupiers is clear and unambiguous.<sup>87</sup> The following part of this section will explore human dignity as a constitutional value after which the rights to human dignity, security of tenure, and access to adequate housing will be unpacked.

### 2 3 3 Human dignity as a constitutional value (sections 1, 7(1), 36(1) and 39(1)(a))

The Constitution expressly declares that the Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity, equality and freedom.<sup>88</sup> The Constitution also declares that the Bill of Rights is the cornerstone of democracy in South Africa; since it entrenches the rights of all people in our country

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<sup>82</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) paras 21-26; referred to in *Minister of Safety & Security v Sekhoto* 2011 5 SA 367 (SCA) para 15; *Eskom Holdings Ltd v National Union of Mineworkers* 2012 2 SA 197 (SCA) para 28.

<sup>83</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) para 24.

<sup>84</sup> *Ahmed v Minister of Home Affairs* 2017 2 SA 417 (WCC) para 17; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

<sup>85</sup> *Ahmed v Minister of Home Affairs* 2017 2 SA 417 (WCC) para 17; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

<sup>86</sup> *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

<sup>87</sup> Para 53; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 90.

<sup>88</sup> Section 1(a) of the Constitution.



and affirms the democratic values of human dignity, equality and freedom.<sup>89</sup> Furthermore, the Constitution makes it clear that the rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom.<sup>90</sup> When a court, therefore, interprets the Bill of Rights it must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>91</sup> Although all of these foundational values are important, the focus of this dissertation is on human dignity as a constitutional value.<sup>92</sup>

Goolam points out that between these three values, human dignity is expressly mentioned first in sections 1, 7, 36 and 39 of the Constitution.<sup>93</sup> The significance of human dignity appearing before equality and freedom, he submits, is because in essence human rights are aimed at protecting the human dignity of people.<sup>94</sup> Similarly, Ackerman agrees with Goolam and takes the idea on human dignity further by stating that “human dignity is not merely a protected and entrenched right, but that the concept of human dignity is definitional to what it means to be human”.<sup>95</sup> In this regard, it is important to note that human dignity is a constitutional value *and* a constitutional right. In the case of *Dawood v Minister of Home Affairs* (“*Dawood*”),<sup>96</sup> O’Regan J meticulously explained and distinguished human dignity as a value, as opposed to a right, in the following way:

“The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in

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<sup>89</sup> Section 7(1).

<sup>90</sup> Section 36(1).

<sup>91</sup> Section 39(1)(a).

<sup>92</sup> It should be mentioned that the endeavour to establish a minimum or common standard of habitability may also implicate the value of equality and the right to equal benefit and enjoyment of the law.

<sup>93</sup> NMI Goolam “Human Dignity – Our Supreme Constitutional Value” (2001) 4 *Potchefstroom Electronic Law Journal* 43 43.

<sup>94</sup> 43 and 44. See also NMI Goolam “The Interim Constitution, the Working Drafts and South Africa’s new Constitution – Some Observations” (1997) 12 *South African Public Law* 186 186.

<sup>95</sup> LWH Ackerman “The Legal Nature of the South African Constitutional Revolution” 2004 *New Zealand Law Review* 633 647.

<sup>96</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).

our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.”<sup>97</sup>

It is clear from the above paragraph that there is a close link between the value of human dignity and other constitutional rights. Thus, human dignity in this regard plays an important role in the interpretation of rights and its significance cannot be over-emphasised.<sup>98</sup> For example, in *Grootboom*, the court interpreted the right to housing by stressing the importance of the value of human dignity. In this respect, the court

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<sup>97</sup> Para 35. See further A Barak *Human Dignity: The Constitutional Value and the Constitutional Right* (2015) 266; De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 459; MR Staffen & M Arshakyan “The Legal Development of the Notion of Human Dignity in the Constitutional Jurisprudence” (2016) 12 *Revista Brasileira de Direito* 108 120-121; *Nelson Mandela Foundation Trust v Afriforum NPC* (EQ02/2018) [2019] ZAEQC 2 (21 August 2019) para 28.

<sup>98</sup> See, for example, Section 39 of the Constitution. See further *S v Makwanyane* 1995 3 SA 391 (CC) paras 144 and 328; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35; *Minister of Home Affairs v National Institute for Crime Prevention (“NICRO”)* 2005 3 SA 280 (CC) para 21; *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 1 SA 984 (CC) paras 47-49; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) paras 31-33; *Harksen v Lane NO* 1998 1 SA 300 (CC) paras 46 and 50-53, 91-92; *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 17-32 and 120-129; *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) paras 41-42 and 48; *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 48; Barak *Human Dignity* 266; R Steinmann “Law and Human Dignity at Odds over Assisted Suicide” (2015) *De Rebus* 24 25; Goolam (2001) *Potchefstroom Electronic Law Journal* 43 50; M Reyneke “The Right to Human Dignity and Restorative Justice in Schools” (2011) 14 *Potchefstroom Electronic Law Journal* 129 130; S Liebenberg “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2000) 21 *South African Journal of Human Rights* 1 6-7; N Haysom “Dignity” in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (l: 18 2015) 5-1 and 5-4.

mentioned that the foundational values of human dignity, freedom and equality are denied to people who do not have access to food, clothing or adequate housing.<sup>99</sup> This means that the value of human dignity informs the standard of life to which someone is entitled to live.<sup>100</sup> Therefore, the use of the value of human dignity in the interpretation of rights, particularly socio-economic rights, may ensure that people live in conditions that enable them to develop their potentials in order to flourish as human beings.<sup>101</sup> The recognition of human dignity as a value in the interpretation of rights also affirms that human dignity is a cornerstone of the rights in chapter 2 of the Constitution.<sup>102</sup> However, the value of human dignity is not a distinct and enforceable right on its own.<sup>103</sup> Amongst other values, human dignity informs and gives substance to the rights contained in chapter 2 of the Constitution since it is foundational.<sup>104</sup>

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<sup>99</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23. See also *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 44; De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 459.

<sup>100</sup> *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC) para 28. See also De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 459.

<sup>101</sup> Liebenberg (2000) *South African Journal of Human Rights* 13. See also De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 459-460.

<sup>102</sup> Sections 1(a) and 39(1)(a) of the Constitution. See further A Chaskalson “Human Dignity as a Foundational Value of our Constitutional Order” (2000) 16 *South African Journal on Human Rights* 193 204; Reyneke (2011) *Potchefstroom Electronic Law Journal* 130; H Botha “Human Dignity in Comparative Perspective” (2009) *Stellenbosch Law Review* 171 197; Currie & De Waal *The Bill of Rights Handbook* 253; MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2002) 130; Haysom “Dignity” in *South African Constitutional Law* 5-1 and 5-6; *S v Makwanyane* 1995 3 SA 391 (CC) para 328.

<sup>103</sup> *Minister of Home Affairs v National Institute for Crime Prevention (“NICRO”)* 2005 3 SA 280 (CC) para 21. See also Barak *Human Dignity* 266; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-22.

<sup>104</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 328. See further *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 32, which provides that dignity is at the heart of individual rights; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 92; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35; *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)* 2005 3 SA 280 (CC) para 21; Barak *Human Dignity* 266; I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 253; Cheadle, Davis & Haysom *South African Constitutional Law* 125-127; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-22; Haysom “Dignity” in *South African Constitutional Law* 5-1; R Steinmann “The Core Meaning of Human Dignity” (2016) 19 *Potchefstroom Electronic Law Journal* 1 8; C McCrudden “Human Dignity and Judicial Interpretation of Human Rights” (2008)

Devenish correctly submits that human dignity as a value constitutes a moral basis for the existence and operation of other fundamental rights.<sup>105</sup> According to the Constitutional Court, human dignity as a constitutional value informs and gives substance to all constitutional rights as evident from a close reading of section 1 of the Constitution, and the manner in which the Constitution is structured, specifically the Bill of Rights.<sup>106</sup>

### 2 3 3 1 Concluding remarks

It is clear that the value of human dignity is significant as it informs how the Bill of Rights may be adjudicated and interpreted under a transformative Constitution.<sup>107</sup> Human dignity as a value would impact on the analysis of whether a dwelling is habitable when legislation (regulating tenants and occupiers) and the common law (regulating tenants and usufructuaries) is interpreted in line with the Constitution and based on constitutional values such as human dignity, equality and freedom.<sup>108</sup> The dissertation now turns to discuss human dignity as a constitutional right and other

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19 *European Journal of International Law* 656 680; Reyneke (2011) *Potchefstroom Electronic Law Journal* 130; O Schachter "Human Dignity as a Normative Concept" (1983) 77 *American Journal of International Law* 848 848-854.

<sup>105</sup> GE Devenish *A Commentary on the South African Bill of Rights* (1999) 81. For a similar view see also Barak *Human Dignity* 266; Cheadle, Davis & Haysom *South African Constitutional Law* 125-127; Haysom "Dignity" in *South African Constitutional Law* 5-3.

<sup>106</sup> *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)* 2005 3 SA 280 (CC) para 21.

<sup>107</sup> Haysom "Dignity" in *South African Constitutional Law* 5-1; Barak *Human Dignity* 266-267. The concept of "transformative constitutionalism" has been described by Klare as "[a] long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction." In the context of this dissertation, "transformative constitutionalism" would mean that courts as ultimate guardians of the Constitution should interpret legislation and the common law to promote constitutional values. Such an interpretation will ensure that constitutional rights are applied in a manner that improves the quality of life of tenants, usufructuaries and occupiers. See generally KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *South African Journal on Human Rights* 146 150; SM Mbenenge "Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape" (2018) 32 *Speculus Juris* 1 2.

<sup>108</sup> See chapter 2 part 2 3 2 above.

fundamental rights such as security of tenure and access to adequate housing, all of which potentially impact on a meaning of habitability in various contexts of occupancy.

#### 2 3 4 *Human dignity as a constitutional right (section 10)*

Section 10 of the Constitution states that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.<sup>109</sup> Human dignity is an inherent characteristic, which all people possess in the same measure.<sup>110</sup> In our constitutional dispensation, human dignity has been recognised as one of the most important rights in the Constitution.<sup>111</sup> Section 10 of the Constitution embodies three basic requirements.<sup>112</sup> The first is the requirement that holds that everyone has inherent dignity.<sup>113</sup> In this context, the inherent dignity of all people in section 10 is an affirmation that the respect for human dignity is a true reflection of the attribute of life

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<sup>109</sup> Section 10 of the Constitution.

<sup>110</sup> Steinmann (2015) *De Rebus* 25. See further *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) paras 32-33, where the court mentioned that human beings are inherently equal in dignity; as well as *S v Makwanyane* 1995 3 SA 391 (CC) para 329, where the court found that the Constitution affirms the equal worth of all South Africans. Likewise, in *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 50, the court reiterated that all persons have the same inherent worth and dignity as human beings. See further *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 42; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) para 43.

<sup>111</sup> Staffen & Arshakyan (2016) *Revista Brasileira de Direito* 108 120; Reyneke (2011) 129 131; Goolam (2001) *Potchefstroom Electronic Law Journal* 43 43; Haysom “Dignity” in *South African Constitutional Law* 5-1; *S v Makwanyane* 1995 3 SA 391 (CC) paras 144 and 328; *Ferreira v Levin* NO; *Vryenhoek v Powell* NO 1996 1 SA 984 (CC) para 47.

<sup>112</sup> Steinmann (2016) *Potchefstroom Electronic Law Journal* 6; Steinmann (2015) *De Rebus* 25; LR Barroso “Here, There and Everywhere: Human Dignity in Contemporary Law and the Transitional Discourse” (2012) 35 *Boston College International & Comparative Law Review* 331 360; N Rao “Three Concepts of Human Dignity in Constitutional Law” (2011) 86 *Notre Dame Law Review* 183 187-189; Botha (2009) *Stellenbosch Law Review* 189-190; McCrudden (2008) *European Journal of International Law* 679; Schachter (1983) *American Journal of International Law* 848 849-854.

<sup>113</sup> Steinmann (2015) *De Rebus* 25; Steinmann (2016) *Potchefstroom Electronic Law Journal* 6; McCrudden (2008) *European Journal of International Law* 656 679.



in its entirety and not some advantage granted to people by the state.<sup>114</sup> Inherent dignity speaks to the sense of self-worth a person has as an individual and as a member of the society. It encompasses a personal understanding that each and every person is worthy of acknowledgement as a human being and should be treated humanely.<sup>115</sup> Therefore, conduct or conditions that may result in a person being seen as less human is unacceptable in terms of section 10 of the Constitution.<sup>116</sup>

The second requirement in section 10 relates to the idea that everyone is entitled to have their human dignity respected. This further includes the entitlement to receive treatment that is consistent with human dignity from other people.<sup>117</sup> Goolam suggests that for true respect of human dignity as required by section 10 of the Constitution to have more practical value or impact, the meaning of “tolerance” as reflected in the UN Educational, Scientific and Cultural Organisation (“UNESCO”) 1995 *Declaration on the Principles of Tolerance* should be applied in our constitutional dispensation.<sup>118</sup> Goolam further submits that our courts should, in this new constitutional dispensation, invoke the meaning of “tolerance” as reflected in article 1 of Declaration on the Principles of Tolerance (“DPT”).<sup>119</sup> This is because “tolerance” as defined in the DPT is consistent with respect for human rights and its application in our constitutional dispensation will mean the rejection of social injustice or weakening of one's rights. Practicing tolerance would mean that one is entitled to have his or her rights respected and protected.<sup>120</sup> This may ensure that every person lives in a habitable dwelling.

The third requirement of human dignity is that the state or private individuals (in special circumstances where the private person is required by legislation and other

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<sup>114</sup> Chaskalson (2000) *South African Journal on Human Rights* 193 196; Goolam (2001) *Potchefstroom Electronic Law Journal* 43 46; Steinmann (2016) *Potchefstroom Electronic Law Journal* 1 5 and 9-17.

<sup>115</sup> De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 457; *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27; *Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development* 2014 2 SA 168 (CC) para 52.

<sup>116</sup> De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 457; Haysom “Dignity” in *South African Constitutional Law* 5-10 and 5-12.

<sup>117</sup> Steinmann (2015) *De Rebus* 25; Steinmann (2016) *Potchefstroom Electronic Law Journal* 1 6; McCrudden (2008) *European Journal of International Law* 656 679.

<sup>118</sup> See generally Goolam (2001) *Potchefstroom Electronic Law Journal* 48.

<sup>119</sup> Goolam (2001) *Potchefstroom Electronic Law Journal* 48-19.

<sup>120</sup> UNESCO 1995 *Declaration on the Principles of Tolerance*.

measures to provide housing for another)<sup>121</sup> are under the obligation to provide minimum living conditions for its inhabitants in terms of socio-economic rights.<sup>122</sup> These requirements illustrate the importance of human dignity and that it should be accorded to everyone irrespective of race or gender. Although these requirements have not been specifically identified in case law in that manner, a closer look at *S v Makwanyane* (“*Makwanyane*”)<sup>123</sup> shows that judges do apply these requirements when adjudicating matters concerning the Bill of Rights.<sup>124</sup> This is clear from the holding of the court in *Makwanyane* that the recognition of human dignity as a constitutional right asserts the inherent worth of human beings, and implies that human beings are entitled to be treated as worthy of respect and concern.<sup>125</sup>

The right to human dignity sometimes overlaps or conflicts with other fundamental rights. For example, parents have an interest in how their children should be raised. If their child misbehaves, they usually give that child a hiding. The hiding may seem reasonable to the parents as an unruly child may be chastised in terms of religion or their belief. However, the child might find such hiding as unreasonable and inhumane. Moreover, the inflicting of pain may be seen as an infringement of his right in terms of section 10 (human dignity), section 12 (freedom and of security of the person) and

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<sup>121</sup> See, for example, *Daniels v Scribante* 2017 4 SA 341 (CC) paras 48-49; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 32.

<sup>122</sup> Steinmann (2015) *De Rebus* 25; Steinmann (2016) *Potchefstroom Electronic Law Journal* 6; McCrudden (2008) *European Journal of International Law* 656 679; IM Rautenbach “Vonnisbespreking: Sosiale Regte en Private Pligte – Huisvesting op Plase *Daniels v Scribante* 2017 8 BCLR 949 (KH)” (2017) 14 *Litnet Akademies* 959 959; IM Rautenbach “Overview of Constitutional Court Judgments on the Bill of Rights – 2017” (2018) *Tydskrif vir die Suid-Afrikaanse Reg* 367 372-373.

<sup>123</sup> *S v Makwanyane* 1995 3 SA 391 (CC).

<sup>124</sup> Steinmann (2016) *Potchefstroom Electronic Law Journal* 6-8; Steinmann (2015) *De Rebus* 25.

<sup>125</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 328. See further *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 32; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 92; Currie & De Waal *The Bill of Rights Handbook* 252; Staffen & Arshakyan (2016) *Revista Brasileira de Direito* 108 120; Steinmann (2015) *De Rebus* 25; Goolam (2001) *Potchefstroom Electronic Law Journal* 43 45; Reyneke (2011) 129 131-132; Liebenberg (2000) *South African Journal of Human Rights* 1 6-7; A Raath “Human Personhood and Social Benevolence – Reformational Reflections on the Right to Human Dignity” (2007) 72 *Koers: Bulletin for Christian Scholarship* 159 159-191.

section 28 (children's rights). If this is accepted, the human dignity and religious beliefs of the parents might be affected. This is because the parents would be told how to raise their child and could be seen as weak in the eyes of the public if they do not discipline their child where he has done wrong.<sup>126</sup> Where such tension of rights or overlap or conflict ensues, the right to human dignity has been used as an aid that reinforces the overlapping or conflicting rights.<sup>127</sup> The right to human dignity can also be in conflict with other fundamental rights such as the right to life. In such instances, the value of human dignity is essentially used in a limitations analysis in terms of section 36 of the Constitution.<sup>128</sup> In our new constitutional dispensation, the right to human dignity has been used as a device to create rights that were not specifically provided for in legislation or the common law,<sup>129</sup> as evidenced in the recent case of *Daniels*.<sup>130</sup> Consequently, section 10 of the Constitution may be used to give effect to rights that were not recognised in terms of the common law or explicitly stated in legislation. In the next few paragraphs this section continues to discuss the purpose of human dignity, conduct prohibited, and the persons protected and bound by section 10. The discussion will elaborate on human dignity in order to facilitate an appropriate legal understanding of habitability.

The purpose of section 10 of the Constitution is to guarantee everyone respect and protection for their human dignity.<sup>131</sup> This means that everyone should be regarded as bearers of human rights and not as objects to be treated inhumanly by others.<sup>132</sup> This

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<sup>126</sup> *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 15. See other examples in *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 27; Botha (2009) *Stellenbosch Law Review* 182; Barak *Human Dignity* 272.

<sup>127</sup> Steinmann (2015) *De Rebus* 25; Barak *Human Dignity* 157; McCrudden (2008) *European Journal of International Law* 656 680; Cheadle, Davis & Haysom *South African Constitutional Law* 123; Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* 1A-1301A-131; Haysom "Dignity" in *South African Constitutional Law* 5-1.

<sup>128</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35; Steinmann (2015) *De Rebus* 25; Barak *Human Dignity* 157.

<sup>129</sup> Steinmann (2015) *De Rebus* 25.

<sup>130</sup> See *Daniels v Scribante* 2017 4 SA 341 (CC) paras 27-34.

<sup>131</sup> Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* 1A-130; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35; *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 48.

<sup>132</sup> A Devenish *A Commentary on the South African Bill of Rights* (1999) 83; Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* 1A-130; Liebenberg (2000) *South African Journal of Human Rights* 1 6-7; Reyneke (2011) *Potchefstroom Electronic Law*



brings in the conduct that section 10 of the Constitution primarily guards against. Section 10 prohibits conduct that treats persons in a cruel, inhuman, humiliating, or degrading manner.<sup>133</sup> In other words, the infringement of human dignity refers to conduct or ideas that directly offend or degrade human dignity and the worth of people.<sup>134</sup> It is therefore important to pause and point out that the conduct identified here is not an exhaustive list since the courts have not exhaustively tested human dignity against all potential conduct. There are several cases which have, in the past, dealt with the protection of the right to human dignity. These cases indicate what conduct the right to human dignity guards against and in what circumstances such conduct will be prohibited. This discussion may be valuable when considering how human dignity can be used to prevent certain conduct in the context of an owner or landlord denying tenants, usufructuaries and/or occupiers a certain standard of habitability. In this regard, human dignity relates to both conduct and living conditions.

In *Makwanyane*, the court held that at the very core of the right to human dignity lies the fact that everyone is entitled to claim protection against conduct that is cruel, inhuman and degrading.<sup>135</sup> In *National Coalition for Gay & Lesbian Equality v Minister of Justice* (“*Minister of Justice*”)<sup>136</sup> the court, in turn, found that the common law crime of sodomy constituted an infringement of the right to equality and human dignity.<sup>137</sup> This is because gay men were simply arrested, prosecuted and convicted when they

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*Journal* 131; *Advance Mining Hydraulics v Botes* 2000 1 SA 815 (T) 823; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 71; *S v Dodo* 2001 3 SA 382 (CC) para 38; *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 187.

<sup>133</sup> D Davis, H Cheadle & N Haysom *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 73; Currie & De Waal *The Bill of Rights Handbook* 254; Devenish A *Commentary on the South African Bill of Rights* 84; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-130 - 1A-133; Haysom “Dignity” in *South African Constitutional Law* 5-10 and 5-12; Reyneke (2011) *Potchefstroom Electronic Law Journal* 129 133; *Advance Mining Hydraulics v Botes* 2000 1 SA 815 (T) 823.

<sup>134</sup> Steinmann (2016) *Potchefstroom Electronic Law Journal* 1 16. See also Schachter (1983) *American Journal of International Law* 851 852; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-130, 1A-134.

<sup>135</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 111. See also Currie & De Waal *The Bill of Rights Handbook* 254.

<sup>136</sup> *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

<sup>137</sup> Para 28. See also De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 459.

engaged in sexual conduct that was ordinarily part of human experience. According to the court, such a punishment degraded and devalued gay men and impaired their human dignity in terms of section 10.<sup>138</sup> In another case of *S v Williams* (“*Williams*”),<sup>139</sup> the court pointed out that the reason for the protection against cruel, inhuman or degrading conduct was the acknowledgement of how the community views decency in line with human dignity.<sup>140</sup> The protection afforded by section 10 of the Constitution was taken further in other cases as well. For instance, in *Stanfield v Minister of Correctional Services* (“*Stanfield*”),<sup>141</sup> the court found that section 10 protects against conduct that denies a terminally-ill prisoner to die in peace with his family.<sup>142</sup> In *Robert James Stransham-Ford v Minister of Justice & Correctional Services* (“*Stransham-Ford*”),<sup>143</sup> the court, in turn, found that allowing a terminally-ill patient to suffer in an undignified way without assisted suicide amounts to an infringement of human dignity under section 10.<sup>144</sup> The protection that everyone enjoys in terms of section 10 also relates to conduct in which living conditions are deplorable or degrading as illustrated in *Mpange* and *Daniels*.<sup>145</sup> Therefore, it is clear that human dignity may not be limited to conduct that infringes one’s personality; respect for human dignity may also require that one lives in conditions that befit a standard of human dignity.<sup>146</sup>

Before one may argue that their human dignity has been infringed by either the conduct of another or the conditions in which they live, it is important to determine whether such a person is in fact a bearer of the right to human dignity, or falls within the category of persons who are protected by section 10 of the Constitution. In terms of section 10, every person (whether natural or juristic, such as a company) has a right

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<sup>138</sup> *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28. See also De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 459.

<sup>139</sup> *S v Williams* 1995 3 SA 632 (CC).

<sup>140</sup> Para 35. See also Currie & De Waal *The Bill of Rights Handbook* 254.

<sup>141</sup> *Stanfield v Minister of Correctional Services* 2004 4 SA 43 (C).

<sup>142</sup> Para 129. See also Steinmann (2016) *Potchefstroom Electronic Law Journal* 16.

<sup>143</sup> *Robert James Stransham-Ford v Minister of Justice & Correctional Services* 2015 4 SA 50 (GNP).

<sup>144</sup> Para 12.

<sup>145</sup> See *Daniels v Scribante* 2017 4 SA 341 (CC) para 31; *Mpange v Sithole* 2007 6 SA 578 (W) paras 53-55.

<sup>146</sup> Liebenberg (2000) *South African Journal of Human Rights* 9. See also De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 460.

to have their human dignity respected and protected.<sup>147</sup> This dissertation will however only focus on human dignity exercised or enjoyed by a natural person. This is because the dissertation deals with categories of inhabitants that live in property belonging to a private person.

In contrast to the beneficiaries of the right as mentioned above, the persons that are bound by section 10 of the Constitution include the state and all its organs.<sup>148</sup> This is because the state and all its organs have an obligation in terms of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>149</sup> Arguably, this obligation may include a duty to ensure habitability of dwellings inhabited by the categories of comparison. In *Carmichele v Minister of Safety and Security* (“*Carmichele*”),<sup>150</sup> the Constitutional Court confirmed that the state is obliged by the Constitution and international law to protect the human dignity of people.<sup>151</sup> In this regard, the obligation of the state or its organs is to protect the human dignity of persons against impairment by other persons or state arms. This obligation is fulfilled when the state protects the dignity of persons against the conduct of other persons by putting laws in place which prohibit undignified conduct and provide for or make

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<sup>147</sup> Section 10 of the Constitution. See also Barak *Human Dignity* 272; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-130; H Cheadle “Application” in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (l: 18 2015) 3-23 – 3-26.

<sup>148</sup> Section 8(1) of the Constitution. See further Devenish *A Commentary on the South African Bill of Rights* 91; Davis, Cheadle & Haysom *Fundamental Rights in the Constitution* 70-71; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-130, 1A-134; Haysom “Dignity” in *South African Constitutional Law* 5-14.

<sup>149</sup> Section 7(2) of the Constitution. See further Steinmann (2015) *De Rebus* 25; Steinmann (2016) *Potchefstroom Electronic Law Journal* 9 and 23; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-130; Van Loggerenberg “Excerpts from the Constitution of the Republic of South Africa, 1996” in *Erasmus: Superior Court Practice* A1-2; D Davis “Rights” in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (l: 18 2015) 2-4 – 2-9 and 5-14; *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC) paras 40-41, where the court underlined that the state has an obligation to protect and fulfil the right in Chapter 2 of the Constitution; *Advance Mining Hydraulics v Botes* 2000 1 SA 815 (T) 823.

<sup>150</sup> *Carmichele v Minister of Safety & Security* 2001 4 SA 938 (CC).

<sup>151</sup> Paras 44 and 62. See also Steinmann (2016) *Potchefstroom Electronic Law Journal* 9.

remedies available in the case of infringement.<sup>152</sup> As Ackermann and Goldstone JJ put it in *Carmichele* “there is a duty imposed on the state and all of its organs not to perform any act that infringes [fundamental] rights. In some circumstances, there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection [against possible infringement].”<sup>153</sup> The same argument on the obligations of the state in terms of the Constitution was made in *Glenister v President of the Republic of South Africa* (“*Glenister*”),<sup>154</sup> where the court emphasised that section 7(2) of the Constitution imposes special obligations on the state. For that reason, the court concluded that the requirement that the state “must respect, protect, promote and fulfil the rights in the Bill of Rights” entails that the state must create efficient mechanisms through which infringement of the Bill of Rights is curbed.<sup>155</sup> However, human dignity may also apply between private individuals in certain instances. This is because a provision of the Bill of Rights may bind either natural or juristic persons.<sup>156</sup> More importantly, section 10 reinforced by section 8(2) of the Constitution, may imply that certain persons are duty-bound to uphold human dignity and not to impair it. This may include the responsibility that every person should treat other human beings in a dignified and humane manner.<sup>157</sup> Consequently, in the circumstances where human dignity is claimed against the state, its organs, or private persons in certain instances, the interpretation of any law, its application and

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<sup>152</sup> Devenish *A Commentary on the South African Bill of Rights* 91; Davis, Cheadle & Haysom *Fundamental Rights in the Constitution* 70-71; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-134.

<sup>153</sup> *Carmichele v Minister of Safety & Security* 2001 4 SA 938 (CC) para 44. See similarly *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 721 (CC) para 71.

<sup>154</sup> *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

<sup>155</sup> Para 177. See also *My Vote Counts NPC v President of the Republic of South Africa* 2017 6 SA 501 (WCC) para 35.

<sup>156</sup> Section 8(1)-(2) of the Constitution. See further Devenish *A Commentary on the South African Bill of Rights* 91; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-130, 1A-134; Van Loggerenberg “Excerpts from the Constitution of the Republic of South Africa, 1996” in *Erasmus: Superior Court Practice* A1-2.

<sup>157</sup> Goolam (2001) *Potchefstroom Electronic Law Journal* 43 46; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-134.

development must promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution.<sup>158</sup>

## 2 3 4 1 Concluding remarks

Against this background, it can be concluded that human dignity is an inherent characteristic of human beings which recognises the intrinsic worth of a human being. The protection given by section 10 of the Constitution is aimed at preventing conduct and living conditions that degrade the inherent dignity of humans. The implication of section 10 of the Constitution on the standard of habitability is that everyone has inherent human dignity and by implication, they may be entitled to live somewhere in dignity. Moreover, human dignity may require another to receive equal treatment and concern from others and not be regarded as an instrument to fulfil their objective. Furthermore, as will be argued in chapters 3, 4 and 5 below, section 10 (in conjunction with section 8(1) to (2) of the Constitution) may require the state or private individuals to provide inhabitants with minimum habitable living conditions in terms of socio-economic rights. This provides the platform for looking at another constitutional right potentially impacting on habitability, namely the right to security of tenure, which is discussed below.

## 2 3 5 *Security of tenure (section 25(6))*

Section 25(6) of the Constitution provides for secure tenure. It reads:

“[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”<sup>159</sup>

Section 25(6) of the Constitution clearly seeks to ensure that persons or communities who lost security of tenure or even those who never had secure tenure as a consequence of apartheid discriminatory laws or practices are enabled by way of an Act of Parliament to have security of tenure restored to them. Nevertheless, if there is no possibility that the lost security of tenure can be restored to such a person or

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<sup>158</sup> Devenish *A Commentary on the South African Bill of Rights* 91.

<sup>159</sup> Section 25(6) of the Constitution.

community, they are eligible for comparable redress.<sup>160</sup> It is noteworthy to point out that section 25(6) of the Constitution emphasises “legally secure” tenure for a person or community. According to Pienaar, the reference to “legally secure” tenure includes (a) the content, definition and delineation of the form of tenure, and (b) how to enforce the form of tenure.<sup>161</sup> She submits that “legally secure” in the context of the latter two points, speaks to the legal meaning of the kind of tenure that one enjoys within a property law context. Pienaar further points out that “legally secure” in relation to how to enforce the form of tenure focuses on the protection the tenure affords individuals or communities in instances of unlawful invasion or eviction.<sup>162</sup>

The core of section 25(6) is to ensure that a person possesses a certain level of security where they stay. In this regard, there cannot be true security of tenure devoid of access to adequate housing. This is because security of tenure is a key element of access to adequate housing. Moreover, security of tenure and access to adequate housing are closely linked to habitability in the following terms: if the house is not habitable, the dweller is denied access to adequate housing that would have enabled the dweller to hold a degree of security of tenure. As a result, the dweller may vacate the house because it is not habitable, which in effect impacts on the right to security of tenure of the dweller if he or she is rendered homeless.<sup>163</sup> It is a vicious cycle really, and all the elements (namely habitability, secure tenure and access to adequate housing) potentially impact on each other. The question of whether occupiers have secure tenure seems to be wider than the question of whether they live in habitable property. This discussion further raises questions about the purpose of section 25(6) of the Constitution, specifically in terms of the conduct that the provision aims to protect against, who the bearers are of the right and who is bound to fulfil the right in terms of the provision. These are dealt with briefly below. Against the backdrop of the above discussion, it is important to note that, the purpose of section 25(6) of the Constitution

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<sup>160</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 165. See also Pienaar *Land Reform* 390; Khoza *Socio-Economic Rights in South Africa* 204; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 19.

<sup>161</sup> Pienaar *Land Reform* 390.

<sup>162</sup> 390.

<sup>163</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 33-34.



is to provide and guarantee persons with secure land tenure which had become legally insecure as a result of past racially discriminatory laws or practices.<sup>164</sup>

In general, section 25(6) provides a person or community legal protection against any form of unlawful interference, harassment or other threats related to eviction.<sup>165</sup> This is commendable since evictions need to be monitored by the courts.<sup>166</sup> In *PE Municipality*, the court recognised that property rights, the right to access to adequate housing and the right not to be arbitrarily evicted from one's home, are interrelated. Thus, the stronger the right to property, the greater the prospect of a secure home for inhabitants.<sup>167</sup> Section 25(6) of the Constitution further protects individuals or communities who had property rights violated as a result of apartheid practices or laws, bearing in mind section 8(1) to (2) of the Constitution.<sup>168</sup> The purpose of section 8(1) to (2) of the Constitution is to ensure that the rights enshrined in the Constitution are enforceable against the state or private persons.<sup>169</sup> Therefore, the protection guaranteed by section 25(6) of the Constitution is to the extent provided for in an Act of Parliament.<sup>170</sup> Parliament must thus enact the legislation referred to in section 25(6) of the Constitution.<sup>171</sup> For purposes of this dissertation, ESTA is an important example of legislation that was enacted by Parliament that specifically aims to secure tenure and give effect to section 25(6) of the Constitution.<sup>172</sup> ESTA provides the state with

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<sup>164</sup> Pienaar *Land Reform* 390; Currie & De Waal *The Bill of Rights Handbook* 560; Rautenbach (2018) *Tydskrif vir die Suid-Afrikaanse Reg* 372.

<sup>165</sup> Currie & De Waal *The Bill of Rights Handbook* 559-561; Pienaar *Land Reform* 390; CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8(a); Rapelang *An Evaluation of the Right to "Access to Adequate Housing"* 19.

<sup>166</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 32.

<sup>167</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 19. See also Khoza *Socio-Economic Rights in South Africa* 237.

<sup>168</sup> Section 25(6), read together with section 8(2) of the Constitution. See also Pienaar *Land Reform* 390; Khoza *Socio-Economic Rights in South Africa* 26; Cheadle "Application" in *South African Constitutional Law: The Bill of Rights* 3-23.

<sup>169</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 157.

<sup>170</sup> Section 25(6) of the Constitution. See also *Daniels v Scribante* 2017 4 SA 341 (CC) para 13.

<sup>171</sup> Section 25(9) of the Constitution. See also Pienaar *Land Reform* 390; Pienaar & Brickhill "Land" in *CLOSA* 48-25.

<sup>172</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 13; Currie & De Waal *The Bill of Rights Handbook* 561; Rautenbach (2018) *Tydskrif vir die Suid-Afrikaanse Reg* 372.



measures to facilitate long-term security of land tenure. It regulates the conditions of residence on certain land. Moreover, it regulates the conditions on, and circumstances under which, the right of persons to reside on land may be terminated. The circumstances under which persons, whose right of residence had been terminated, may be evicted from land, is also set out in ESTA.<sup>173</sup> It will thus be necessary to determine the extent to which section 25(6) points towards a minimum standard of habitability for occupiers. This statement should not be construed to mean that section 25(6) is not applicable in the context of tenants and usufructuaries.

The obligation imposed by section 25(6) is both positive and negative in nature.<sup>174</sup> The Constitution provides that where a right in the Bill of Rights is at stake, the state must “respect, protect, promote and fulfil the rights in the Bill of Rights”.<sup>175</sup> The Constitution further states that a right in the Bill of Rights “applies to all law, and binds the legislature, the executive, and the judiciary and all organs of state”.<sup>176</sup> More specifically in relation to section 25(6), the Constitution stipulates that “[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”.<sup>177</sup> It is clear that in terms of section 25(6) of the Constitution a positive obligation rests on the state to ensure that tenure is restored to persons whose tenure has been lost

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<sup>173</sup> See the purpose of ESTA. See also Pienaar & Brickhill “Land” in *CLOSA* 48-28 – 48-29; Khoza *Socio-Economic Rights in South Africa* 211.

<sup>174</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 49.

<sup>175</sup> See section 7(2) of the Constitution. See further A Nolan “*Daniels v Scribante*: South Africa Pushes the Boundaries for Horizontality and Social Rights” (2017) *International Journal on Constitutional Law Blog* 1/3 2/3; *Governing Body of the Juma Musjid Primary School v Essay NO* (CCT 29/10) [2011] ZACC 13 (11 April 2011) *SAFLII* <<http://www.saflii.org/za/cases/ZACC/2011/13.html>> para 45; Van Loggerenberg “Excerpts from the Constitution of the Republic of South Africa, 1996” in *Erasmus: Superior Court Practice* A1-2; Davis “Rights” in *South African Constitutional Law: The Bill of Rights* 2-4 – 2-9; Khoza *Socio-Economic Rights in South Africa* 35-37; *Advance Mining Hydraulics v Botes* 2000 1 SA 815 (T) 823.

<sup>176</sup> Section 8(1) of the Constitution. See further *Daniels v Scribante* 2017 4 SA 341 (CC) para 157; Nolan (2017) *International Journal on Constitutional Law Blog* 1/3 2/3; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-193; Van Loggerenberg “Excerpts from the Constitution of the Republic of South Africa, 1996” in *Erasmus: Superior Court Practice* A1-2; Cheadle “Application” in *South African Constitutional Law: The Bill of Rights* 3-15 – 3-16.

<sup>177</sup> Section 25(5) of the Constitution.

due to racially discriminatory laws or practices.<sup>178</sup> The state also has a negative obligation to refrain from doing something that may limit another person's access to and enjoyment of secure tenure.<sup>179</sup> Nevertheless, a reading of the words "legislative and other measure" in the constitutional provision could arguably be a source of also holding private owners liable to ensure that other persons gain access to and enjoy secure tenure.<sup>180</sup> The state has already taken reasonable legislative measures by enacting ESTA.<sup>181</sup> In this respect, section 25(6) of the Constitution enjoins landowners through ESTA to provide occupiers with dwellings to use as accommodation.<sup>182</sup> As a private owner voluntarily provides housing to occupiers on its land, the owner may arguably bear a primary positive obligation to provide housing with secure tenure.<sup>183</sup> This is because the owner may be enjoined by the Constitution through ESTA to make his or her land available to the occupier to use as accommodation. The landowner may also bear a negative obligation not to improperly interfere with the occupier's right to security of tenure.<sup>184</sup>

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<sup>178</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 167.

<sup>179</sup> De Vos et al "Socio-Economic Rights" in *South African Constitutional Law in Context* 671-674.

<sup>180</sup> S Liebenberg "The Application of Socio-Economic Rights to Private Law" (2008) *Tydskrif vir die Suid-Afrikaanse Reg* 464 468; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 328-329; S Liebenberg "Socio-Economic Rights Beyond the Public-Private Law Divide" in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014) 63 70-71; J Klaaren "An Institutional Interpretation of Socio-Economic Rights and Judicial Remedies after TAC" in H Botha, AJ van der Walt and J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 105 105-115; J Klaaren "A Remedial Interpretation of the Treatment Action Campaign Decision" (2003) 19 *South African Journal on Human Rights* 455 460-461.

<sup>181</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 3.

<sup>182</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 49.

<sup>183</sup> Para 49.

<sup>184</sup> Para 49. See further *In re: Certification of the Constitution of the Republic of South Africa* 1996 1996 4 SA 744 (CC) para 78; *Governing Body of the Juma Musjid Primary School v Essay NO* (CCT 29/10) [2011] ZACC 13 (11 April 2011) SAFLII <<http://www.saflii.org/za/cases/ZACC/2011/13.html>> para 58; *Jaftha v Schoeman Van Rooyen v Stoltz* 2005 2 SA 140 (CC) paras 33-34; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) paras 68-71; *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 721 (CC) para 46; *Government of the Republic of South Africa v*

The landowners' liability may also lie in the fact that the application of constitutional rights is not only limited to the relationship between the state and natural persons. The rights in the Constitution may also apply between natural persons and private landowners. This is clear from and reinforced by section 8(2) of the Constitution which states that a right in the Bill of Rights may bind a natural or juristic person "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."<sup>185</sup> However, it is apparent that some of the rights in the Constitution may potentially be applicable and enforceable against the state.<sup>186</sup> This is because section 8(1) of the Constitution expressly pronounces that the rights contained in the Constitution bind the state and its respective organs.<sup>187</sup>

Furthermore, section 8(2) of the Constitution provides for the fact that the Bill of Rights in the Constitution may bind natural or juristic persons depending on whether the right applies to the particular person, and having regard to the nature of the right and the obligation imposed by the rights.<sup>188</sup> This means that it may be expected in some circumstances, where the private landowner is required by legislative and other policy or judicial measures to make its property available for use as accommodation, to provide a habitable dwelling to its inhabitants.<sup>189</sup> In light of the above discussion on the obligation imposed by section 25(6), a private landowner may be obliged to provide habitable dwellings to its occupant depending on a number of considerations. First, whether the owner was enjoined by legislation and other policy or judicial measures to provide housing for use as accommodation. Second, the nature of the right and the obligation imposed by the right. Finally, whether the landowner improperly interfered with the occupant's rights. In the respective chapters that follow, the dissertation will focus on the obligation imposed by the Constitution in the context of section 25(6) where private individuals are bound.

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*Grootboom* 2001 1 SA 46 (CC) para 34; *Van Eeden v Minister of Safety & Security* 2003 1 SA 389 (SCA) para 13; *S v Baloyi* 2000 2 SA 425 (CC) para 11.

<sup>185</sup> Section 8(2) of the Constitution. See also Nolan (2017) *International Journal on Constitutional Law Blog* 1/3 2/3; Van Loggerenberg "Excerpts from the Constitution of the Republic of South Africa, 1996" in *Erasmus: Superior Court Practice* A1-2.

<sup>186</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 157.

<sup>187</sup> Para 157.

<sup>188</sup> Para 157.

<sup>189</sup> Para 49.

## 2 3 5 1 Concluding remarks

In light of the discussion of the right to security of tenure, it is clear that there may be an integral link between security of tenure and habitability specifically in the context of the right to access to adequate housing and human dignity. Although occupiers (to the extent provided in legislation) are at all stages of their occupancy obviously subject to section 25(6) of the Constitution as opposed to tenants (subject to a lease agreement) and usufructuaries (subject to a usufruct grant), all of these occupants arguably may not be excluded from protection in terms of the right contained in section 25(6) of the Constitution. Furthermore, it needs to be assessed whether the link between security of tenure and habitability may be used as a minimum standard of habitability for tenants, usufructuaries and occupiers in South African law because they enjoy protection in terms of the Constitution. In addition to the above-mentioned rights and their impact on the standard of habitability that various inhabitants may expect in light of the Constitution, the right to access to adequate housing that is essential to the right to human dignity, will be discussed next.

## 2 3 6 *Access to adequate housing (section 26)*

Section 26 makes provision for the right to have access to adequate housing. It provides as follows:

- “(1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”<sup>190</sup>

The right enshrined in section 26(1) of the Constitution is a right to access to adequate housing. The Constitutional Court has interpreted the right as meaning more than a physical structure.<sup>191</sup> Access to adequate housing further requires available land,

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<sup>190</sup> Section 26(1), (2) and (3) of the Constitution.

<sup>191</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35. See further *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 49; Rapelang *An Evaluation of the Right to “Access to Adequate Housing”* 22; S Rosa *The Means and the*

appropriate services such as water, removal of sewages and money to finance every necessity including that of building the dwelling itself. Accordingly, land, services and a dwelling encapsulate what would ordinarily be access to adequate housing.<sup>192</sup> This immediately reveals a link between habitability and the right to access to adequate housing. Housing gives rise to tenure and requires services like daily removal of sewage and refuse for the house to be in an acceptable condition. All of these are correlated with habitability.<sup>193</sup> Here also, it should be mentioned that the question of whether one has access to adequate housing as defined here seems to be wider than the question of whether the categories of comparison live in habitable dwellings.

Van Bueren shows that “adequate” in section 26(1) of the Constitution means that the dwelling has to be habitable.<sup>194</sup> This may mean that there can be no access to adequate housing in a dwelling that is not habitable. In this regard, Van Bueren indicates that for housing to be “adequate” it must be habitable and provides its inhabitants with adequate space, protection from the elements, and other threats to health and physical safety.<sup>195</sup> Rapelang mentions in this regard that the right to access to adequate housing guarantees everyone a safe, healthy and secure place to live in peace and human dignity.<sup>196</sup> As mentioned earlier, this is also underpinned by section 152(1)(d) of the Constitution, which provides for the promotion of safe and healthy environments.

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*Ends of Justice: The Interaction Between Socio-Economic Rights and Administrative Justice in a South African Democratic Developmental State* LLD dissertation, Stellenbosch University (2017) 129; Muller (2015) *Southern African Public Law* 71 72; L Chenwi “The Right to Have Access to Adequate Housing” (2007) 8 *Economic and Social Rights Review in South Africa* 21 22; Khoza *Socio-Economic Rights in South Africa* 34.

<sup>192</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35. See further Muller (2015) *Southern African Public Law* 71 72; Chenwi (2007) *Economic and Social Rights Review in South Africa* 22; Rapelang *An Evaluation of the Right to “Access to Adequate Housing”* 22; Rosa *The Means and the Ends of Justice* 129; Khoza *Socio-Economic Rights in South Africa* 34; G van Bueren “Housing” in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (I: 18 2015) 21-6 – 21-7.

<sup>193</sup> M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* PhD thesis, University of Nottingham (1992) 380.

<sup>194</sup> Van Bueren “Housing” in *South African Constitutional Law* 21-8.

<sup>195</sup> Van Bueren “Housing” in *South African Constitutional Law* 21-8, citing CESCR’s General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8(d).

<sup>196</sup> Rapelang *An Evaluation of the Right to “Access to Adequate Housing”* 21.

In *Grootboom*, the court observed that “[t]he Constitution will be worth infinitely less than its paper if ... action concerned with housing is determined without regard to the fundamental constitutional value of human dignity”.<sup>197</sup> This correctly flows from the premise that the rights in the Bill of Rights are interrelated with human dignity and are all equally important.<sup>198</sup> Similarly, the court in *Jaftha v Schoeman; Van Rooyen v Stoltz* (“*Jaftha*”) mentioned that human dignity is inherently linked with socio-economic rights.<sup>199</sup> Apart from that, it is an essential pivot of a society based on human dignity, equality and freedom to have rights integrally linked to one another in order to give effect to each other. Therefore, it is imperative to evaluate action on the right to access to housing with the inherent dignity of human beings.<sup>200</sup> This is because housing is important for human dignity.<sup>201</sup>

The purpose of section 26 of the Constitution is to promote and guarantee everyone access to adequate housing and provide people with rights protecting their homes.<sup>202</sup> Khoza states that the aim of section 26(1) of the Constitution is to give people access to housing, basic needs and services, which are crucial for human beings to lead a dignified life.<sup>203</sup> In terms of section 26, everyone (including children) is a beneficiary of the right to access to adequate housing.<sup>204</sup> In *Khosa v Minister of Social Development*;

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<sup>197</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83. See also *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 10.

<sup>198</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 23 and 83. See also Khoza *Socio-Economic Rights in South Africa* 27.

<sup>199</sup> *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 24.

<sup>200</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83. See also Khoza *Socio-Economic Rights in South Africa* 20; Van Bueren “Housing” in *South African Constitutional Law* 21-3.

<sup>201</sup> Khoza *Socio-Economic Rights in South Africa* 21; Chenwi (2007) *Economic and Social Rights Review in South Africa* 21; Rapelang *An Evaluation of the Right to “Access to Adequate Housing”* 8; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 44; *Malan v City of Cape Town* 2014 6 SA 315 (CC) para 127.

<sup>202</sup> S Liebenberg “Housing” in D Davis, H Cheadle & N Haysom (eds) *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 334.

<sup>203</sup> Khoza *Socio-Economic Rights in South Africa* 20.

<sup>204</sup> Section 26 of the Constitution. See further *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34; Cheadle “Application” in *South African Constitutional Law: The Bill of Rights* 3-23 – 3-26; Rautenbach “Introduction to the Bill of Rights” in *Bill of*



*Mahlaule v Minister of Social Development* (“Khosa”),<sup>205</sup> the court mentioned that the right in section 26 of the Constitution is for the benefit of both citizens and non-citizens.<sup>206</sup> Section 26 of the Constitution, like any other fundamental right, imposes a mixture of obligations either on the state or on a private landowner or individual.<sup>207</sup> According to Chenwi, the right to access to adequate housing is one of the most important rights enshrined in the Constitution for the enjoyment of all other rights.<sup>208</sup> She further notes that housing is essential for human dignity and physical and mental health and also for socio-economic development. She concludes by pointing out the importance of the right to access to adequate housing in terms of the Constitution, especially section 7(2), which makes it mandatory for the state or its organs to respect, protect, promote and fulfil the right to access to adequate housing by taking reasonable legislative measures that realise this right as stipulated in section 26(1) to (2) of the Constitution.<sup>209</sup> The relevant legislative measures enacted to realise this right for purposes of this dissertation include a) the Housing Act 107 of 1997 (“HA”);

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*Rights Compendium* 1A-206; Van Bueren “Housing” in *South African Constitutional Law* 21-6; Khoza *Socio-Economic Rights in South Africa* 26 and 237.

<sup>205</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC).

<sup>206</sup> Paras 46-47. See also *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC) paras 19-20, where Mokgoro J pointed out that non-citizens are a vulnerable group in general and thus have little political muscle. Accordingly, excluding them from claiming socio-economic rights is discriminatory; Khoza *Socio-Economic Rights in South Africa* 42.

<sup>207</sup> A Nolan “Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland” (2014) 12 *International Journal of Constitutional Law* 61 76; Khoza *Socio-Economic Rights in South Africa* 20; Cheadle “Application” in *South African Constitutional Law: The Bill of Rights* 3-1; Liebenberg “South Africa: Adjudicating Social Rights under a Transformative Constitution” in *Social Rights Jurisprudence* 78; S Ellmann “A Constitutional Confluence: American ‘State Action’ Law and the Application of South Africa’s Socio-Economic Rights Guarantees to Private Actors” in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law* (2001) 444 444.

<sup>208</sup> Chenwi (2007) *Economic and Social Rights Review in South Africa* 1.

<sup>209</sup> 21. See also Rapelang *An Evaluation of the Right to “Access to Adequate Housing”* 8; Hohmann *The Right to Housing* 96; JC Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 2 ed (2013) 145.



b) the Rental Housing Act 50 of 1999 (“RHA”) or the Rental Housing Amendment Act 35 of 2014 (once it is signed into law) (“RHAA”); and c) ESTA.<sup>210</sup>

Section 26 of the Constitution binds both the state and private persons.<sup>211</sup> Although section 26 does not explicitly stipulate the obligations imposed on the state or private persons, a negative obligation does exist upon the state and all other private entities to refrain from preventing or impairing the right to access to adequate housing.<sup>212</sup> Concerning the state, it must further endeavour to protect individuals from violations of this right caused by other persons.<sup>213</sup> Liebenberg submits that section 26 of the Constitution has the potential to bind private individuals if they do not refrain from interfering with another’s right to access to adequate housing.<sup>214</sup> In *Grootboom*, the

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<sup>210</sup> Mubangizi *The Protection of Human Rights in South Africa* 145-146.

<sup>211</sup> Section 26(1)-(2) of the Constitution. See further Liebenberg “Housing” in *Fundamental Rights in the Constitution* 353 and 349; Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 82, 317-335; S Liebenberg “The Interpretation of Socio-Economic Rights” in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed Vol 2 (RS: 6 2014) 33-6; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-207; Van Loggerenberg “Excerpts from the Constitution of the Republic of South Africa, 1996” in *Erasmus: Superior Court Practice* A1-2; Davis “Rights” in *South African Constitutional Law: The Bill of Rights* 2-4 – 2-9; D Horsten “The Role Played by the South African Human Rights Commissions, Economic and Social Rights Report in Good Governance in South Africa” (2006) 9 *Potchefstroom Electronic Law Journal* 177 177; Khoza *Socio-Economic Rights in South Africa* 20 and 35-37; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 34 and 38; *Advance Mining Hydraulics v Botes* 2000 1 SA 815 (T) 823.

<sup>212</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34. See further *Mpange v Sithole* 2007 6 SA 578 (W) para 50; *Minister of Health v Treatment Action Campaign (2)* 2002 5 SA 703 (CC) para 46; *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 721 (CC) para 69; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) paras 37-38; *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 4 SA 744 (CC) para 78; Currie & De Waal *The Bill of Rights Handbook* 568; Khoza *Socio-Economic Rights in South Africa* 20 and 24; Liebenberg “The Interpretation of Socio-Economic Rights” in *CLOSA* 33-17; G van Bueren “Housing” in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (l: 18 2015) 21-2 and 21-6.

<sup>213</sup> Khoza *Socio-Economic Rights in South Africa* 20.

<sup>214</sup> Liebenberg “Housing” in *Fundamental Rights in the Constitution* 353. See also Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-207; Currie & De Waal *The Bill of Rights Handbook* 568-584; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 34 and 38.

court held that a right to access to adequate housing suggests that it is not only the state that has the obligation to provide accommodation for people; private landowners should be enabled by legislative and other measures to house others.<sup>215</sup> This means that a private owner may, in certain instances as required by legislative and other measures, bear a positive obligation to provide housing for certain categories of inhabitants such as tenants, usufructuaries or occupiers. As it may be appropriate to impose an obligation on the private landowner to provide constitutional rights in terms of legislative and other measures in certain circumstances, it may imply that a landowner can also have the positive obligation to ensure habitability because he or she has that obligation under the right to access to adequate housing.

The conduct that section 26(3) of the Constitution guards against is conduct that evicts people from their homes, or demolishes their homes without a court order.<sup>216</sup> In *Grootboom*, the court described the eviction of people without a court order as premature and inhumane with the effect of leaving people without their homes and their possessions destroyed.<sup>217</sup> This indicates that our Constitution has a special regard for peoples' homes since a home is viewed as more than a shelter protecting people from natural disasters or other threats, but also a place where people should enjoy personal and family security.<sup>218</sup> Sachs J in *PE Municipality* recognised that eviction from a home or demolition thereof is "a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat".<sup>219</sup> With this in mind, section 26 of the Constitution stands to show that conduct that prevents people from residing in their houses in peace, security and human dignity is contrary to the Constitution.<sup>220</sup> Additionally, unhealthy living conditions, lack of tenure, inadequate housing and lack of access to adequate basic services like water or

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<sup>215</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35.

<sup>216</sup> Section 26(3) of the Constitution. See further Liebenberg "Housing" in *Fundamental Rights in the Constitution* 349; Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* 1A-209; Currie & De Waal *The Bill of Rights Handbook* 586-587; Khoza *Socio-Economic Rights in South Africa* 240; *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 10.

<sup>217</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 10. See also Van Bueren "Housing" in *South African Constitutional Law* 21-2.

<sup>218</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17.

<sup>219</sup> Para 17.

<sup>220</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 7.

sanitation violates the right to access to adequate housing.<sup>221</sup> However, an eviction or demolition of a home is permissible after obtaining a court order where the court had considered all the relevant circumstances of the people concerned.<sup>222</sup> Liebenberg points out that the relevant circumstances the court must take into account before it grants an order for eviction or demolition includes taking into account the personal circumstances of those denied a place to reside.<sup>223</sup> Moreover, the right to adequate housing also prevents conduct by legislation authorising arbitrary evictions.<sup>224</sup> This means that the state is precluded from enacting legislation in which arbitrary evictions are permitted.<sup>225</sup>

## 2 3 6 1 Concluding remarks

It is clear from the above discussion that section 26 was included in the Constitution in order for people to gain access to adequate housing. As indicated above, the right is very wide and it grants the holder thereof, at the very least, protection of existing housing that meets a particular standard. However, for an inhabitant to really have that access to housing that is adequate, the dwelling must be habitable. The impact of section 26 of the Constitution on the standard of habitability is that, at the very least, adequate housing has to be habitable in order to provide inhabitants with an opportunity to enjoy other fundamental rights such as human dignity and security of tenure. Interestingly, this standard is the same minimum standard of habitability as reflected in the CESCR's General Comment 4, which sets out the meaning of habitability in relation to the right to adequate housing dealt with below.<sup>226</sup> The courts

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<sup>221</sup> Rapelang *An Evaluation of the Right to "Access to Adequate Housing"* 3.

<sup>222</sup> Section 26(3) of the Constitution. See also Liebenberg "Housing" in *Fundamental Rights in the Constitution* 349; Currie & De Waal *The Bill of Rights Handbook* 586-587; Van Bueren "Housing" in *South African Constitutional Law* 21-12.

<sup>223</sup> Liebenberg "Housing" in *Fundamental Rights in the Constitution* 350. See further Van Bueren "Housing" in *South African Constitutional Law* 21-12.

<sup>224</sup> Section 26(3) of the Constitution. See also Liebenberg "Housing" in *Fundamental Rights in the Constitution* 349; Currie & De Waal *The Bill of Rights Handbook* 589; Van Bueren "Housing" in *South African Constitutional Law* 21-12.

<sup>225</sup> Section 26(3) of the Constitution. See also Liebenberg "Housing" in *Fundamental Rights in the Constitution* 349; Van Bueren "Housing" in *South African Constitutional Law* 21-12.

<sup>226</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/1992/23 paras 7-8(d).

have generally invoked this standard in fleshing out the obligations imposed by section 26 of the Constitution.<sup>227</sup> This is commendable because it gives inhabitants the necessary protection and provides guidance towards what would be expected of the right to a habitable house.

From the above analysis, it may be concluded that there is a link between habitability and section 26 of the Constitution. This link comes as a result of habitability being an element of access to adequate housing as contained in section 26. The link may point towards a minimum standard of habitability for tenants, usufructuaries and occupiers. In dealing with sections 26, 25(6) and 10 of the Constitution, the courts have also invoked the prescriptions of the ICESCR and the CESCR's General Comment 4 (for instance in the context of tenants and occupiers where constitutional rights have been at stake). This is because a court interpreting the Bill of Rights must interpret such rights with particular reference to international law.<sup>228</sup> Moreover, when a court interprets any legislation, the court must interpret that legislation in a manner that is compatible with international law.<sup>229</sup> The CESCR tasked with interpreting the ICESCR has noted the meaning of habitability in the CESCR's General Comment 4. The purpose of the next section is to investigate the impact of international law on the standard of habitability to provide a conceptual legal meaning of habitability and canvass what a minimum standard of habitability would be in general or in particular for tenants, usufructuaries and occupiers in the chapters that follow. These issues are addressed below.

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<sup>227</sup> See, for example, *Mpange v Sithole* 2007 6 SA 578 (W) para 51; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 26-33; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 20; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 24.

<sup>228</sup> Section 39(1)(b) of the Constitution. This section stipulates that a court interpreting the Bill of Rights must consider international law.

<sup>229</sup> Section 233 of the Constitution, which require courts when interpreting any legislation to prefer an interpretation that is reasonable and consistent with international law above any interpretation that is inconsistent with international law.

## 2 4 Impact of international law on the standard of habitability

### 2 4 1 Introduction

As already mentioned, the Constitution attaches great value to international law and makes it obligatory for a court interpreting the Bill of Rights to consider international law.<sup>230</sup> This signals that guidance may be sought from international law that has dealt with similar matters at hand before a court of law.<sup>231</sup> Since international law serves to guide the court in interpreting the Bill of Rights, a court must consider such law. However, a court is not bound to follow or to apply international law.<sup>232</sup> As Chaskalson P aptly explained in *Makwanyane*:

“[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour

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<sup>230</sup> See Section 39(1)(b) of the Constitution; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26; *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 23; *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 201; Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 570; Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 101; Devenish *A Commentary on the South African Bill of Rights* 622; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-25; A O’Shea “International Law and the Bill of Rights” in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (SI: 35 2015) 7A-6; D Davis “Interpretation of the Bill of Rights” in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (I: 18 2015) 33-2; J Dugard *International Law: A South African Perspective* 4 ed (2011) 347-348; BV Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* LLM thesis, Stellenbosch University (2010) 5 and 13-37.

<sup>231</sup> *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 23.

<sup>232</sup> Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 103; Devenish *A Commentary on the South African Bill of Rights* 622; Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* 1A-25; O’Shea “International Law and the Bill of Rights” in *Bill of Rights Compendium* 7A-6; De Vos et al “Socio-Economic Rights” in *South African Constitutional Law in Context* 675; BV Slade *International Law in the Interpretation of Sections 25 and 26 of the Constitution* LLM thesis, Stellenbosch University (2010) 5 and 13-37.

Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].”<sup>233</sup>

Thus, international law that is applicable to a particular situation can be a useful guide that can provide a better interpretation and a desired result in line with our Constitution. However, the weight to be attached to international law will differ depending on whether it directly applies to, and binds South Africa.<sup>234</sup> International law applies and binds South Africa in terms of sections 231 and 233 of the Constitution.<sup>235</sup> Section 231, on the one hand, creates a dualist system that South Africa should follow regarding international law.<sup>236</sup> Section 231 further requires that before ratified<sup>237</sup> international law becomes law in South Africa, it must be enacted into law by national legislation.<sup>238</sup> However, a self-executing provision<sup>239</sup> of international law is regarded as law in South Africa, unless it is inconsistent with the Constitution or an Act of Parliament.<sup>240</sup> Section 233 of the Constitution, on the other hand, enjoins a court to prefer any reasonable interpretation of legislation that is consistent with international law.<sup>241</sup> There are a host of sources relating to international law found in international

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<sup>233</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 35. See also *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26; Liebenberg “The Interpretation of Socio-Economic Rights” in CLOSA 33-10 – 33-11; Davis “Interpretation of the Bill of Rights” in *South African Constitutional Law* 33-2.

<sup>234</sup> Sections 231-235 of the Constitution; cited in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26; Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 102-103; Liebenberg “The Interpretation of Socio-Economic Rights” in CLOSA 33-11.

<sup>235</sup> Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 103.

<sup>236</sup> Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 103.

<sup>237</sup> Ratification mean the duty to discharge obligations in good faith. See generally Article 2 of the Vienna Convention on the Law of Treaties 1969 done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol 1155, p 331.

<sup>238</sup> Section 231(4) of the Constitution; Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 103.

<sup>239</sup> A self-executing provision mean a provision of international law that can be directly applied in municipal law without being incorporated into legislation. See generally J Dugard *International Law: A South African Perspective* 4 ed (2011) 68; Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 103.

<sup>240</sup> Section 231(4) of the Constitution; Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 103.

<sup>241</sup> See section 233 of the Constitution in detail.



treaties, declarations and conventions.<sup>242</sup> However, for purposes of this section, the ICESCR and CESCR's General Comment 4<sup>243</sup> is an example of the relevant international law, which may be an important starting point in understanding the impact of international law on the concept and standard of habitability. In this regard, the section below sets out the relevant article of the ICESCR and then deals with the CESCR's General Comment 4 on article 11(1) of the ICESCR, which is soft law that sets out the right to adequate housing in relation to habitability.

#### 2 4 2 *Prescriptions of the ICESCR*

The ICESCR provides the most progressive international standard protecting housing rights.<sup>244</sup> The ICESCR provides that:

"[t]he [s]tates [p]arties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The [s]tates [p]arties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."<sup>245</sup>

It further states that:

"[e]ach [s]tate [p]arty to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>246</sup>

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<sup>242</sup> Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* 105-117; Devenish *A Commentary on the South African Bill of Rights* 622-623; P Dhliwayo *Tenure Security in Relation to Farmland* LLM thesis, Stellenbosch University (2012) 31-35.

<sup>243</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23.

<sup>244</sup> B Thiele "The Human Rights to Adequate Housing: A Tool for Promoting and Protecting Individual and Community Health" (2002) 92 *American Journal of Public Health* 712 713.

<sup>245</sup> Article 11(1) of the ICESCR. See also Muller (2015) *Southern African Public Law* 71 80; S Maass "Rental Housing as Adequate Housing" (2011) 3 *Stellenbosch Law Review* 759 770; S Maass "Rental Housing as Adequate Housing" in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 328.

<sup>246</sup> Article 2(1) of the ICESCR.



South Africa is a state party to the ICESCR and is therefore obliged to recognise the right of everyone to an adequate standard of living for themselves and their families.<sup>247</sup> Consequently, tenants, usufructuaries and occupiers may be protected by the ICESCR.<sup>248</sup> The obligations to be fulfilled by South Africa as a state party to the ICESCR are monitored by the CESCR.<sup>249</sup> Therefore, it is of significance to look at the CESCR's General Comment 4 and its impact on the standard of habitability. In fleshing out the impact of this international law on the standard of habitability, the CESCR's meaning of habitability in the CESCR's General Comment 4 is of particular importance.<sup>250</sup> In the CESCR's General Comment 4, the CESCR's view on the right to housing is neither narrow nor restrictive, as this is a right to inhabit a secure, peaceful and dignified house, which should be considered to be more than the four walls and roof of a house.<sup>251</sup> This is strengthened by the link between the right to adequate housing and human dignity.<sup>252</sup> In this regard, the inherent human dignity of persons informs an interpretation of housing that is "adequate" and is ensured to

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<sup>247</sup> Article 11(1) of the ICESCR; CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 1; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 27.

<sup>248</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 6, which states that the right to adequate housing applies to everyone; Muller (2015) *Southern African Public Law* 71 81, states that the right to adequate housing should not be interpreted in a manner that excludes any person from enjoying its protection.

<sup>249</sup> Thiele (2002) *American Journal of Public Health* 713; Muller (2015) *Southern African Public Law* 71 81; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 29; Khoza *Socio-Economic Rights in South Africa* 238; M Langford & JA King "Committee on Economic, Social and Cultural Rights: Past, Present and Future" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 477 479, 676.

<sup>250</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 7.

<sup>251</sup> Para 7.

<sup>252</sup> Para 7; *Mpange v Sithole* 2007 6 SA 578 (W) para 51. For the link between housing and dignity, see *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83; *Jafftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 24; *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 10.

everyone (including tenants, usufructuaries and occupiers).<sup>253</sup> As such, the CESCR has acknowledged the importance of adequacy concerning the right to housing. This is because adequacy underscores numerous factors that can be used to determine what constitutes adequate housing for the purposes of the CESCR's General Comment 4.<sup>254</sup>

In relation to habitability, the CESCR has noted that:

"Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages [s]tates parties to comprehensively apply the Health Principles of Housing prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates".<sup>255</sup>

There is clearly an important link that exists between habitability and adequate housing, in the sense that a habitable dwelling should be somewhere to live in security, peace and dignity.<sup>256</sup> Moreover, habitability is linked to other human rights such as human dignity.<sup>257</sup> The impact of the CESCR's General Comment 4 on the standard of habitability is that housing should comply with habitability requirements including health and safety standards.<sup>258</sup> These standards require that adequate housing may be recognised as habitable if it provides shelter from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors.<sup>259</sup> By this, it means

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<sup>253</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 7.

<sup>254</sup> Para 8. See also *Jafftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 24; Muller (2015) *Southern African Public Law* 71 82; Maass (2011) *Stellenbosch Law Review* 759 771; Maass "Rental Housing as Adequate Housing" in *Law and Poverty* 329.

<sup>255</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8(d).

<sup>256</sup> Paras 7-8(d).

<sup>257</sup> Paras 7-8. See also *Mpange v Sithole* 2007 6 SA 578 (W) para 51.

<sup>258</sup> Thiele (2002) *American Journal of Public Health* 712.

<sup>259</sup> 713; Khoza *Socio-Economic Rights in South Africa* 239.

that there cannot be adequate housing without habitability, safety and security, which includes the dignified living conditions of inhabitants.<sup>260</sup>

The impact of the ICESCR is that state parties to the ICESCR are under the obligation to respect, protect and fulfil the minimum standard of habitability by adopting legislative standards and regulations.<sup>261</sup> For instance, the state should ensure that every old and new house being built in the public sector corresponds with a minimum standard of habitability.<sup>262</sup> Craven discourages overregulation because it may negatively affect the right to housing. However, he advocates for strict regulation in terms of legislation in the private sector where construction firms are involved in building houses for a profit. He points out furthermore that where local communities or individuals are building houses for themselves, regulation must not be strict since it may discourage people to build their own homes.<sup>263</sup> Hohmann also correctly advocates for less strict regulation in instances where communities or individuals in informal settlements build their own houses. However, where one builds a house to rent out or accommodate another in terms of legislation, there should be regulation to ensure that dwellings are safe and suitable to live in.

Furthermore, CESCR's General Comment 4 invokes the World Health Organisation's ("WHO") health principles of housing, which must be rigidly applied by all state parties. These principles view (uninhabitable) housing as an environmental factor connected with unsafe, unsanitary and inadequate housing.<sup>264</sup> The health

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<sup>260</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 paras 7-8(d). See also Thiele (2002) *American Journal of Public Health* 712 713.

<sup>261</sup> Articles 11(1) and 2(1) of the ICESCR, read together with CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/1992/23 paras 7-8(d). See further Thiele (2002) *American Journal of Public Health* 712 713; M Strauss *A Right to the City for South Africa's Urban Poor* LLD dissertation, Stellenbosch University (2017) 142; Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* 380.

<sup>262</sup> Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* 380.

<sup>263</sup> Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* 380; Craven *The International Covenant on Economic, Social and Cultural Rights* 142-143; Hohmann *The Right to Housing* 25.

<sup>264</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 paras 7-8(d). See also Strauss *A Right to*

principles regulating the link between housing and habitability include the protection from communicable diseases; protection from injuries, poisonings and chronic diseases; reducing psychological and social stresses to a minimum; improving the environment; making informed use of housing; and protecting populations at risk.<sup>265</sup> The first two principles are of particular relevance to habitability. The first principle provides that adequate housing that is habitable may be ensured by way of safe water supply, sanitary disposal of excreta; disposal of solid waste, drainage of surface water, personal and domestic hygiene and structural safeguards from disease vectors.<sup>266</sup> The second principle states that structural safety such as ventilation and light should be ensured. Moreover, the structure of the house should provide physical safety to the inhabitants by not exposing them to dangerous conditions or structural hazards.<sup>267</sup> In light of the above, it may be said that adequate housing is not just a roof over one's head. Adequate housing must be habitable with secure tenure and adhering to the standard of human dignity. Thus, when one or more of the attributes of habitability is not present, it can be said that housing is inadequate because it is uninhabitable.<sup>268</sup> These principles are being taken into account by court in the category of tenants and recently in respect of occupiers. In the context of usufructuaries, the principles have not yet been explicitly stated as a need has not arisen to invoke such principles in that particular context. However, that does not mean that they do not apply to usufructuaries as will be argued in chapter 4. Although it is a very high standard, it should arguably be expected in all categories of comparison, presumably if all these types of inhabitants rely on the Constitution and have regard to international law as required by the Constitution.

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*the City for South Africa's Urban Poor* 142; Thiele (2002) *American Journal of Public Health* 712 713; Hohmann *The Right to Housing* 25.

<sup>265</sup> World Health Organization "Health Principles of Housing, Geneva Switzerland" (1989) WHO <<http://www.who.int/iris/handle/10665/39847>> (12-10-2018). See also Thiele (2002) *American Journal of Public Health* 712 713.

<sup>266</sup> World Health Organization "Health Principles of Housing, Geneva Switzerland" (1989) WHO. See also Thiele (2002) *American Journal of Public Health* 712 713.

<sup>267</sup> World Health Organization "Health Principles of Housing, Geneva Switzerland" (1989) WHO. See also Thiele (2002) *American Journal of Public Health* 712 713.

<sup>268</sup> South African Human Rights Commission 3<sup>rd</sup> *Economic and Social Rights Report 1999-2000* (2001) 250 and 252.

## 2 5 Conclusion

Considering the importance of the habitability of dwellings in the twenty-first century, as a point of departure this chapter conceptualises the legal meaning of habitability by focusing on the elements of habitability, the impact of the Constitution on the standard of habitability and the importance of international law on the standard of habitability in South African law. The chapter concludes that a conceptual legal meaning of habitability may not be viewed in isolation from other fundamental human rights, amongst others, human dignity, security of tenure, and access to adequate housing. This is because the meaning of habitability may carry more weight and practical effect if it is linked with human rights as discussed above. The CESCR's General Comment 4 in this regard also emphasises the importance of linking habitability with other human rights in order to achieve better housing standard.

In terms of the constitutional rights that may provide impetus to understanding habitability, it should be noted that the question of having access to adequate housing and security of tenure as defined in this chapter seems to be wider than the question of whether the dwellings inhabited by tenants, usufructuaries and occupiers are habitable. Although the right to access to adequate housing, the right to security of tenure and the right to human dignity may be used in some (or all) the categories to make an argument that a dwelling that is not habitable will not comply with the standard in terms of each of these constitutional rights, these constitutional provisions arguably do not overtly state when a dwelling is habitable. In different circumstances also these constitutional rights would not provide what constitutes a "habitable dwelling" for the purposes of residential property. However, when habitability is linked with these constitutional rights such as human dignity, security of tenure and access to adequate housing, it may arguably point towards a stronger constitutional standard of habitability for tenancy, *ususfructus* and occupiers.

The general aim of this chapter was to conceptualise the legal meaning of habitability and canvass what may be a minimum standard of habitability in general, or for tenants, usufructuaries and occupiers in South African law, more specifically. The chapter gives an outline of the general principles associated with the legal concept of habitability by pinpointing what may be a minimum standard of habitability. It further investigates the impact of the Constitution and the extent to which the prescriptions of the ICESCR and CESCR's General Comment 4 impacts on the standard of

habitability. A conceptual understanding of habitability has laid the foundation to investigate whether the meaning of habitability and/or the standard of habitability is similar for tenants, usufructuaries and occupiers in chapters 3, 4, and 5 of the dissertation. These issues are examined in the respective chapters that follow.

## CHAPTER 3: HABITABILITY IN THE CONTEXT OF TENANTS

### 3 1 Introduction

The Rental Housing Amendment Act 35 of 2014 (“RHAA”) will introduce a change to the South African residential tenancy law.<sup>1</sup> Of particular relevance to this chapter, the change as suggested by the RHAA lies in the meaning of habitability in the context of tenants, and the obligation that ordinarily rests on the landowner to place and maintain the property in a condition reasonably fit for the purpose for which it was leased.<sup>2</sup> Before the RHAA was introduced, landowners<sup>3</sup> are obliged under the common law to provide tenants with a dwelling<sup>4</sup> that is in a condition reasonably fit for the purpose for which it was leased.<sup>5</sup> The obligation of the landowner in that regard will be changed to habitability in terms of the RHAA.<sup>6</sup> Hence, habitability in the context of tenants should be considered against the background of the move from the common law regulating the position towards more protection for tenants in terms of a standard of habitability as envisioned in the RHAA. Against this background, this chapter seeks to investigate how the notion of habitability is and should be viewed in the context of tenants occupying dwellings belonging to landowners. It remains to be seen what the individual standard is in this regard, and whether a minimum standard can be derived in terms

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<sup>1</sup> G Glover *Kerr’s Law of Sale and Lease* 4 ed (2014) 385; S Viljoen *The Law of Landlord and Tenant* (2016) 200-201; SI Mohamed *Landlord and Tenant – Rights and Obligations* (2019) 45; Mohamed “Safeguards for Tenants ‘Habitability will Replace Fit for the Purpose’ Obligation” (12-11-2014) *Daily News*.

<sup>2</sup> Glover *Kerr’s Law of Sale and Lease* 385; Viljoen *The Law of Landlord and Tenant* 200-201; Mohamed *Landlord and Tenant* 45; Mohamed “Safeguards for Tenants ‘Habitability will Replace Fit for the Purpose’ Obligation” (12-11-2014) *Daily News*.

<sup>3</sup> For the purpose of gender neutrality as required in the RHAA, this dissertation will henceforth use the term “landowner” rather than “landlord” or “landlady”. See generally Van der Merwe & Pienaar (2014) *Annual Survey of South African Law* 844; Mohamed “Safeguards for Tenants ‘Habitability will Replace Fit for the Purpose’ Obligation” (12-11-2014) *Daily News*.

<sup>4</sup> Section 1 of the RHA provides that a “dwelling, includes any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or similar structure which is leased, as well as any storeroom, outbuilding, garage or demarcated parking space which is leased as part of the lease”. See also Mohamed *Landlord and Tenant* 18; SI Mohamed *Tenant and Landlord in South Africa: A Guide to the Rights, Duties and Responsibilities of Tenant and Landlord of Residential Dwellings* (2004) 9; SI Mohamed *Tenant and Landlord in South Africa* 2 ed (2010) 16; KM Kern “Letting and Hiring” in CJ Nagel (ed) *Commercial Law* 4 ed (2011) 242-243.

<sup>5</sup> See part 3 4 1 below.

<sup>6</sup> See part 3 4 3 below.



of the Constitution for this category of inhabitant. Finally, it needs to be determined whether an obligation rests on the tenant, the owner or the state when it comes to ensuring that the dwelling is in a habitable state.

The first segment of this chapter will consider the meaning of habitability in the context of tenants to find out what individual standard of habitability exists for tenants. The assumption is that tenants enjoy the right to the use and enjoyment of a dwelling belonging to the landowner, which implies a particular standard of habitability. Thereafter, the second section of this chapter will examine the impact of the Constitution on the standard of habitability for tenants in light of the rights to access to adequate housing and human dignity as outlined in chapter 2. The assumption is that an examination of the impact of the Constitution on the standard of habitability for tenants will show a link between habitability and the right to access to adequate housing and human dignity as enshrined in the Constitution. It will be argued that such a link will imply a minimum standard of habitability for tenants.

The final part of this chapter will investigate on whom the obligation rests to ensure habitability. More specifically, it will question whether such an obligation rests on a private landowner in the case where property is let privately, or on the tenant, or on the state. In this regard, it is assumed that the obligation to ensure habitability in the context of tenants rests on the landowner in so far as such an obligation ensures the promotion of safe and suitable living conditions for tenants.

## **3 2 Meaning of habitability in the context of tenants**

### **3 2 1 Common-law position of “fit for the purpose for which the dwelling was rented”**

The meaning of habitability in the context of tenants is essentially based on the common-law requirement that the dwelling to be rented must be in a condition that is reasonably fit for the purpose for which it was leased.<sup>7</sup> The case of *Hunter v Cumnor*

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<sup>7</sup> See, for example, *Viljoen v Cleaver* 1945 NPD 332 334; *Poynton v Cran* 1910 AD 205 214 and 221; *Marais v Cloete* 1945 EDL 238 242-243; *Bahadur v Phillipson* 1956 4 SA 638 (FC) 641; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A) 150; *Proud Investments (Pty) Ltd v Lanchem Inter (Pty) Ltd* 1991 3 SA 738 (A) 748; *Pete’s Warehousing & Sales CC v Bowsink Investments CC* 2000 3 SA 833 (E) 839; *Stewart & Co v Executors of Staines* (1861-1863) 4 Searle 152 159-160; *Nannucci v Wilson & Co* (1894) 11 SC 240 244-245; *Tee v Mcllwraith* 1905 19 ECD 282 286; *Jacobson v Bloch* 1906 TS 350 352; *Frenkel & Co v Rand Mines Produce Supply Co* 1909 TS 129 131; *Salmon v Dedlow* 1912 TPD 971

*Investments* (“*Hunter*”)<sup>8</sup> provides authority in this regard. In this case, the court confirmed that the underlying common law principle of a lease was that the landowner was under the duty to repair defects in the property to be leased. Moreover, the landowner had to place and maintain the dwelling in a condition fit for the purpose for which it was leased.<sup>9</sup> This common-law fit for the purpose principle was confirmed in a number of other cases.<sup>10</sup> However, habitability was ignored despite it being an

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978; *Bosomworth v Labistour* (1914) 35 NPD 79 84; *Bowen v Daverin* 1914 AD 632 650; *Smook v Dreyer* 1918 OPD 1 3-4; *African Theatres Trust Ltd v Estate Mccubbin* (1919) 40 NPD 277 279; *Henning v Le Roux* 1921 CPD 587 590; *Cape Town Municipality v Paine* 1923 AD 207 218; *Amin v Ebrahim* 1926 47 NPD 1 7; *Holborn House Ltd v Katz & Lourie Ltd* 1941 TPD 10 12; *Viljoen v Cleaver* 1945 NPD 332 334 and 336; *Sarkin v Koren (2)* 1949 3 SA 545 (C) 551-552; *Sarkin v Koren (3)* 1950 1 SA 495 (C) 499-500; *Hunter v Cumnor Investments* 1952 1 SA 735 (C) 740; *Heerman’s Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 4 SA 391 (D) 393; *Fourie No en ‘n Ander v Potgietersrusse Stansraad* 1987 2 SA 921 (A) 931; *Mpange v Sithole* 2007 6 SA 578 (W) para 28; *Gateway Properties (Pty) Ltd v Bright Idea Projects* 249 CC 2014 3 All SA 577 (KZP) paras 22 and 24.

<sup>8</sup> *Hunter v Cumnor Investments* 1952 1 SA 735 (C).

<sup>9</sup> 740. See *Mohamed Landlord and Tenant* 42-43.

<sup>10</sup> See, for example, *Stewart & Co v Executors of Staines* (1861-1863) 4 Searle 152 159-160; *Nannucci v Wilson & Co* (1894) 11 SC 240 244-245; *North Western Hotel Ltd v Rolfes Nebel & Co* 1902 TS 324 333; *Tee v Mcllwraith* 1905 19 ECD 282 286; *Jacobson v Bloch* 1906 TS 350 352; *Assignees Kaiser Brothers v Continental Caoutchouc Company* (1906) 23 SC 736 739; *Frenkel & Co v Rand Mines Produce Supply Co* 1909 TS 129 131; *Poynton v Cran* 1910 AD 205 214; *Murman v Minchin* (1905-1910) 10 HCG 313 323-326; *Salmon v Dedlow* 1912 TPD 971 978; *Bowen v Daverin* 1914 AD 632 650; *Bosomworth v Labistour* (1914) 35 NPD 79 84; *Smook v Dreyer* 1918 OPD 1 3-4; *Henning v Le Roux* 1921 CPD 587 590; *Cape Town Municipality v Paine* 1923 AD 207 218; *Amin v Ebrahim* 1926 47 NPD 1 7; *Shapiro v Yutar* 1930 CPD 92 100; *Holborn House Ltd v Katz & Lourie Ltd* 1941 TPD 10 12; *Viljoen v Cleaver* 1945 NPD 332 334; *Marais v Cloete* 1945 EDL 238 242-243; *Bowman v Stanford* 1950 2 SA 210 (D) 214; *Bahadur v Phillipson* 1956 4 SA 638 (FC) 641; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A) 150; *The Treasure Chest v Tambuti Enterprises* 1957 2 SA 738 (A) 744 and 752; *Heerman’s Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 4 SA 391 (D) 393; *Fourie NO en ‘n Ander v Potgietersrusse Stansraad* 1987 2 SA 921 (A) 931; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A) 150; *Proud Investments (Pty) Ltd v Lanchem Inter (Pty) Ltd* 1991 3 SA 738 (A) 748; *Pete’s Warehousing & Sales CC v Bowsink Investments CC* 2000 3 SA 833 (E) 839; *African Theatres Trust Ltd v Estate Mccubbin* (1919) 40 NPD 277 279; *Sarkin v Koren (2)* 1949 3 SA 545 (C) 551-552; *Sarkin v Koren (3)* 1950 1 SA 495 (C) 499-500; *Fourie v Hansen* 2001 2 SA 823 (W) 838; *Mpange v Sithole* 2007 6 SA 578 (W) para 28; *Gateway Properties (Pty) Ltd v Bright Idea Projects* 249 CC 2014 3 All SA 577 (KZP) paras 22 and 24.

important requirement for letting and hiring.<sup>11</sup> For instance, a tenant has a just cause to cancel the lease where the dwelling is uninhabitable.<sup>12</sup> Nonetheless, there are a few cases that envisaged the fit for the purpose requirement to include habitability by specifically referring to the notion. These cases are dealt with below.

*Alexander v Armstrong* (“*Armstrong*”)<sup>13</sup> is one of the oldest cases that confirm the existence of habitability in the common-law fit for the purpose requirement. In this case, De Villiers CJ noted that a landowner was obliged to hand over the dwelling to be let to the tenant in a safe and habitable condition, and in a fit and proper state of repair.<sup>14</sup> This holding in *Armstrong* confirms that habitability forms part of the common-law requirement that the dwelling to be leased should be fit for the purpose for which it was leased. In the case of *Cape Town Municipality v Paine* (“*Paine*”),<sup>15</sup> Innes CJ also held that the common law places an obligation on the landowner to deliver and maintain the property to be leased in a condition that is reasonably fit for the purpose for which it was let.<sup>16</sup> Consequently, the court held that a failure on the part of the landowner to reasonably repair the dwelling to make it habitable gives a tenant sufficient reason to cancel the lease agreement.<sup>17</sup> Thus, the holding in *Paine* endorses the importance of habitability to the common-law position of fit for the purpose for which the property was rented. *Barker v Beckett & Co Ltd* (“*Barker*”)<sup>18</sup> is yet another case where the court reiterated that at common law the landowner is required to place and maintain the property in a proper and habitable state. Thus, if a court found that the property was uninhabitable, the tenant was permitted to cancel the lease.<sup>19</sup> The holding in *Barker* also confirms that habitability is part of the common-law fit for the purpose principle.

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<sup>11</sup> See Mohamed *Landlord and Tenant* 43; Mohamed “Fit to Let Doesn’t Mean Habitable” (10-04-2012) *Daily News*.

<sup>12</sup> *Cape Town Municipality v Paine* 1923 AD 207 218 and 226; Mohamed *Landlord and Tenant* 43; Mohamed “Fit to Let Doesn’t Mean Habitable” (10-04-2012) *Daily News*.

<sup>13</sup> *Alexander v Armstrong* 1879 9 Buch 233 SC.

<sup>14</sup> 234. See also Mohamed *Landlord and Tenant* 43.

<sup>15</sup> *Cape Town Municipality v Paine* 1923 AD 207.

<sup>16</sup> 218, citing *Poynton v Cran* 1910 AD 205 221.

<sup>17</sup> *Cape Town Municipality v Paine* 1923 AD 207 226. See also Mohamed *Landlord and Tenant* 43.

<sup>18</sup> *Barker v Beckett & Co Ltd* 1911 TPD 151.

<sup>19</sup> 157, citing *Alexander v Armstrong* 1879 9 Buch 233 SC 234.

In *Stewart & Co v Executors of Staines* (“*Stewart*”),<sup>20</sup> Hodges CJ similarly mentioned that the duty upon the landowner is to maintain and keep the thing leased in a proper and habitable state of repair. This is to allow the tenant to occupy the dwelling in a reasonably fit condition.<sup>21</sup> Hodges CJ in *Stewart* clearly shows that habitability is relevant to (and in fact informs) the common-law fit for the purpose principle. De Villiers CJ in *Bensley v Clear* (“*Bensley*”)<sup>22</sup> similarly found that the obligation of the landowner was to place and keep the property let in a proper and habitable state of repair so that the property can be reasonably fit for the purpose for which it was let.<sup>23</sup> The case of *Bensley* makes it even clearer that habitability is essential to the fit for the purpose requirement. In the case of *Tee v Mcilwraith* (“*Tee*”),<sup>24</sup> Kotze JP likewise ruled that when the landowner leases property he must deliver and maintain the property to be let to the tenant in a proper and habitable state of repair so that the property can be reasonably fit for human occupation.<sup>25</sup> The court in *Tee* seems to support the idea that habitability forms part of the common-law requirement that the property to be let must be in a condition reasonably fit for the purpose for which it was leased.

In the case of *Amin v Ebrahim* (“*Amin*”),<sup>26</sup> Tatham J also pointed out that a landowner was obliged to hand over to the tenant and maintain the property to be let in a proper and habitable condition for the property to be used in a reasonably fit condition.<sup>27</sup> The *Amin* case reinforces the fact that habitability is part of our common-law fit for the purpose principle. *Mpange v Sithole* (“*Mpange*”),<sup>28</sup> is another case where exactly this point is made. Here, the court found that the landowner must deliver and maintain the property let in a condition that is reasonably fit for the purpose for which it was let. This includes providing the tenants with adequate space, protection from the

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<sup>20</sup> *Stewart & Co v Executors of Staines* (1861-1863) 4 Searle 152.

<sup>21</sup> 159.

<sup>22</sup> *Bensley v Clear* 1878 8 Buch 89.

<sup>23</sup> 90.

<sup>24</sup> *Tee v Mcilwraith* 1905 19 ECD 282.

<sup>25</sup> 286.

<sup>26</sup> *Amin v Ebrahim* 1926 47 NPD 1.

<sup>27</sup> 7, citing *Stewart & Co v Executors of Staines* (1861-1863) 4 Searle 152 159; *Tee v Mcilwraith* 1905 19 ECD 282 286; *Salmon v Dedlow* 1912 TPD 971 978; *Cape Town Municipality v Paine* 1923 AD 207 218.

<sup>28</sup> *Mpange v Sithole* 2007 6 SA 578 (W).

elements, threats to health, safety, human dignity and the premises being free from defects.<sup>29</sup> This means that the common-law *fit for the purpose* requirement is not fulfilled when the landowner has failed to hand over and maintain the dwelling premises in a proper and habitable condition.<sup>30</sup>

The cases of *Armstrong, Paine, Barker, Stewart, Bensley, Tee, Amin* and *Mpange* indicate that the courts already had the language of habitability in terms of the common law, but this was not expressly stated before and only developed in these few cases.<sup>31</sup> Thus, when the courts referred to *habitable* in the context of the common-law *fit for the purpose* requirement they suggested that the *fit for the purpose* requirement in fact includes habitability.<sup>32</sup> Nevertheless, the common-law requirement of *fit for the purpose* for which the dwelling was let/leased does not have a corresponding and/or similar meaning to habitability. In this regard, Mahomed correctly notes that fit to let does not mean the property is habitable.<sup>33</sup> Thus, a habitable dwelling is considered as such when it adheres to an individual standard including elements such as adequate space, protection from weather conditions, threats to health, safety, and a building that is free from defects.<sup>34</sup> This provides tenants with better protection because it prevents tenants from accepting occupation of dwellings which are in a state of disrepair. As clearly indicated by the case of *Mpange*, the courts already applied the elements of habitability, but in terms of the common-law requirement of fit for the purpose.

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<sup>29</sup> Paras 28-32 and 51-55, citing *Poynton v Cran* 1910 AD 205 214; *Hunter v Cumnor Investments* 1952 1 SA 735 (C) 740A; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A) 150H; *Cape Town Municipality v Paine* 1923 AD 207 218; *Amin v Ebrahim* 1926 NPD 1 7; *Tee v McIlwraith* 1905 (19) ECD 282 286; CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8.

<sup>30</sup> *Mpange v Sithole* 2007 6 SA 578 (W) para 32; G Bradfield & K Lehmann *Principles of the Law of Sale & Lease* 3 ed (2013) 114; G D'Amato *The Duties and Rights of Tenants and Landlords under Swiss and South African Law – A Comparative Analysis* LLM dissertation, University of Cape Town (2015) 13; Mohamed *Landlord and Tenant* 44.

<sup>31</sup> Mohamed *Landlord and Tenant* 43-44; Mohamed "Fit to Let Doesn't Mean Habitable" (10-04-2012) *Daily News*.

<sup>32</sup> See especially *Mpange v Sithole* 2007 6 SA 578 (W) para 28.

<sup>33</sup> Mohamed *Landlord and Tenant* 43; Mohamed "Fit to Let Doesn't Mean Habitable" (10-04-2012) *Daily News*.

<sup>34</sup> See *Mpange v Sithole* 2007 6 SA 578 (W) paras 28-32 and 51.

### 3 2 1 1 Concluding remarks

It is clear from the cases mentioned above that courts seem to endorse habitability in terms of the common law similar to the definition of habitability as envisaged by the RHAA. This is despite the fact that the cases were decided before the RHAA was introduced. Therefore, these cases decided under the common law, in any event, endorse the definition of habitability as provided in terms of the RHAA, and the elements of habitability were already applied by the court even though the RHAA is not applicable yet. Now that this subsection has established the meaning of habitability in terms of the common-law fit for the purpose requirement, the next subsection indicates the impact of legislation on the existing common law as it relates to the meaning of habitability.

### 3 2 2 *The impact of the Rental Housing Act*

The RHA envisages habitability to mean residential premises that can offer acceptable living conditions and are maintained properly.<sup>35</sup> This means that the residential property to be let should be fit and suitable for human occupation. Therefore, premises which are unhygienic, unsafe and exposes tenants to unnecessary risk to life or property will not be considered fit or suitable for human habitation.<sup>36</sup> The RHA does not change the existing common-law requirement that the dwelling must be fit for the purpose for which it was rented.<sup>37</sup> Rather, the RHA confirms the common-law position that the landowner must ensure that a dwelling is in a condition that is reasonably fit for human habitation at the commencement of the lease, and such a landowner should maintain the dwelling in the same condition.<sup>38</sup>

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<sup>35</sup> Section 13(4) of the RHA. See further Bradfield & Lehmann *Principles of the Law of Sale & Lease* 114; D'Amato *The Duties and Rights of Tenants and Landlords under Swiss and South African Law* 13; SI Mohamed *Rights and Obligations of Landlord and Tenant: A Study in Light of the Shari'ah (Islamic Law) and the South African Rental Housing Act* MA thesis, University of Durban-Westville (2002) 147.

<sup>36</sup> See *Mpange v Sithole* 2007 6 SA 578 (W) paras 28-33; *Tee v Mcilwraith* 1905 19 ECD 282 286; *Amin v Ebrahim* 1926 47 NPD 1 7; Bradfield & Lehmann *Principles of the Law of Sale & Lease* 144; Mohamed *Tenant and Landlord in South Africa* 32; D'Amato *The Duties and Rights of Tenants and Landlords under Swiss and South African Law* 13.

<sup>37</sup> Mohamed *Tenant and Landlord in South Africa* 16.

<sup>38</sup> See Regulation 6(1)(b)(i) of the Unfair Practice Regulations to the Rental Housing Act 50 of 1999 GN 340 in GG 30863 of 14-03-2008 issued by the Department of Housing. See further



The importation and modification of the common-law fit for the purpose requirement into the RHA is an improvement because it protects the rights of tenants even more. Moreover, the RHA provides the courts with the authority to hold landowners liable for the failure to let residential property that is acceptable for living conditions.<sup>39</sup> However, this applies unless the tenant signed a lease agreement relieving the landowner of his common-law fit for purpose obligation.<sup>40</sup> Nevertheless, the RHA still falls short of the elements of habitability as outlined by the courts in cases like *Armstrong, Paine, Barker, Stewart, Bensley, Tee, Amin* and *Mpange* mentioned above. To sum up, the RHA confirms the common-law fit for the purpose requirement and envisions habitability to mean property that is fit and acceptable for living conditions. As it stands now, the meaning of habitability in the context of tenants is in terms of the common-law fit for the purpose requirement, which is essentially confirmed in the RHA. However, Parliament has intervened to improve the living conditions of tenants even further in terms of the RHAA. More specifically, the RHAA incorporates very pertinently the definition of habitability in the context of tenants. As such, the following subsection discusses the impact of the RHAA on the existing common law.

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Regulation 7(1)(b)(i) of the Gauteng Unfair Practice Regulations, promulgated under and in terms of the Rental Housing Act 50 of 1999 GN 4004 in GG 30863 of 04-07-2001, as amended by GN 1472 of 04-06-2002; Regulation 4(1)(a)(i) of the Western Cape Unfair Practice Regulations, made in terms of the Rental Housing Act 50 of 1999 GN 5822 in GG 20726 of 01-02-2002; Bradfield & Lehmann *Principles of the Law of Sale & Lease* 114; D'Amato *The Duties and Rights of Tenants and Landlords under Swiss and South African Law* 13.

<sup>39</sup> Section 13(4)(c) of the RHA. See further Regulation 6(1)(b)(i), read together with Regulation 13(1)(a)-(g) of the Unfair Practice Regulations to the Rental Housing Act 50 of 1999 GN 340 in GG 30863 of 14-03-2008 issued by the Department of Housing; Regulation 7(1)(b)(i), read together with Regulation 14(1)(a)-(g) of the Gauteng Unfair Practice Regulations, promulgated under and in terms of the Rental Housing Act 50 of 1999 GN 4004 in GG 30863 of 04-07-2001, as amended by GN 1472 of 04-06-2002; Regulation 4(1)(a)(i), read together with Regulation 9(1)(a)-(g) of the Western Cape Unfair Practice Regulations, made in terms of the Rental Housing Act 50 of 1999 GN 5822 in GG 20726 of 01-02-2002; Bradfield & Lehmann *Principles of the Law of Sale & Lease* 144; D'Amato *The Duties and Rights of Tenants and Landlords under Swiss and South African Law* 13.

<sup>40</sup> Mohamed "Safeguards for Tenants 'Habitability will Replace Fit for the Purpose' Obligation" (12-11-2014) *Daily News*.



### 3 2 3 *The impact of the Rental Housing Amendment Act*

As already mentioned, in terms of the common law and the RHA, the landowner must let a dwelling that is in a condition that is reasonably fit for human habitation. This common-law fit for the purpose warranty, which was incorporated into the RHA, will soon to be amended by the RHAA.<sup>41</sup> In terms of this RHAA, the requirement of *fit for the purpose* will be replaced with *habitability*.<sup>42</sup> Therefore, the RHAA is a valuable contribution to the understanding of habitability in relation to tenants. Not only does the RHAA provide for the word “habitability”, but it goes further and defines habitability in the context of tenants as:

“a dwelling that is safe and suitable for living in and includes adequate space, protection from elements and other threats to health, physical safety of the tenant, the tenant’s household and visitors, and a structurally sound building”.<sup>43</sup>

A close analysis of the definition of habitability in terms of the RHAA reveals that the meaning of habitability in the context of tenants contains some similar elements of the CESCR’s General Comment 4 as mentioned in chapter two. The meaning of habitability in the RHAA focuses on the right to reside in a dwelling and the use and enjoyment of such dwelling. It also emphasises the safety and suitability of the structure for residential purposes and further requires an individual standard in the form of elements such as adequacy, security, physical safety and a building that is free from defect or damage. Van der Merwe and Pienaar properly point out that the definition of habitability in the RHAA builds on the principle that rental housing should be usable and suitable.<sup>44</sup> Thus the insertion of a definition of habitability in the RHAA

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<sup>41</sup> See section 4B(11) of the RHAA. See also Glover *Kerr’s Law of Sale and Lease* 385; Viljoen *The Law of Landlord and Tenant* 200; Mohamed *Landlord and Tenant* 45.

<sup>42</sup> See sections 1 and 4B(11) of the RHAA read together. See further Viljoen *The Law of Landlord and Tenant* 200; Glover *Kerr’s Law of Sale and Lease* 385; Bapela & Stoop (2016) *De Rebus* 18-20; Mohamed *Landlord and Tenant* 45; Mohamed “Safeguards for Tenants ‘Habitability will Replace Fit for the Purpose’ Obligation” (12-11-2014) *Daily News*.

<sup>43</sup> Section 1 of the RHAA. See further Glover *Kerr’s Law of Sale and Lease* 385; Bapela & Stoop (2016) *De Rebus* 19; Viljoen *The Law of Landlord and Tenant* 200; Van der Merwe & Pienaar (2014) *Annual Survey of South African Law* 844; Stoop (2014) *Annual Survey of South African Law* 811; Mohamed *Landlord and Tenant* 45; Mohamed “Safeguards for Tenants ‘Habitability will Replace Fit for the Purpose’ Obligation” (12-11-2014) *Daily News*.

<sup>44</sup> Van der Merwe & Pienaar (2014) *Annual Survey of South African Law* 844.

is a vast improvement in protecting the rights of tenants, and it provides the courts with more authority regarding what constitutes a habitable dwelling.<sup>45</sup>

The impact of the RHAA on the existing common law is that it explicitly adds the definition of habitability. The RHAA makes habitability a compulsory statutory requirement, which was not an express requirement in terms of the common law and courts had to essentially read it into the requirement of fit for the purpose of rental housing. Thus, the statutory requirement of habitability for dwellings that are leased to individuals for residential purposes will now be applied consistently in all cases by the courts or tribunals. This also means that habitability will no longer be ignored as it was in some instances in terms of the common law. Furthermore, the RHAA makes it compulsory for the landowner to guarantee that the dwelling or property is safe and suitable to inhabit, including a warranty of all the elements of habitability.

### 3 2 4 *Concluding remarks*

The above section aimed to consider the meaning of habitability in the context of tenants, and it is clear that a standard of habitability exists for tenants in terms of the common law-position that has crystallised in a number of cases mentioned in this section. Moreover, this standard as established basically as an extension of the common-law fit for the purpose requirement seems to provide a baseline that would make it possible for a tenant to hold a landowner liable unless that tenant has specifically agreed in the lease agreement to waive the right. This standard seems to be reinforced by the RHA, which endorses the standard of habitability that can be expected when property is rented for residential purposes. The impending RHAA is even more direct in its protection of tenants and its assurance that tenants are able to occupy habitable dwellings. The common law and the legislation in this regard arguably point towards a possible standard of habitability in the context of tenants. The consideration of the meaning of habitability in the context of tenants has paved the way for the analysis of the impact of the Constitution on the standard of habitability for tenants, because it will be important to determine whether the Constitution provides even further reinforcement of tenants' right to demand habitable dwellings. This is examined in the next section.

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<sup>45</sup> Viljoen *The Law of Landlord and Tenant* 200; Mohamed "Safeguards for Tenants 'Habitability will Replace Fit for the Purpose' Obligation" (12-11-2014) *Daily News*.

### 3 3 Impact of the Constitution on the standard of habitability for tenants

Section 26 of the Constitution reinforces a standard of habitability for tenants. This section provides for the right to have access to adequate housing.<sup>46</sup> However, habitability may also be linked with other constitutional rights such as the right to human dignity, depending on whether the uninhabitable living condition implicates such fundamental rights.<sup>47</sup> Interestingly, in *Mpange*, Satchwell J linked habitability with the right to access to adequate housing.<sup>48</sup> The implication of this link signals that the conduct of the state or that of a landowner should not be the reason that tenants do not enjoy aspects of the right to access to adequate housing.<sup>49</sup>

The constitutional obligation in respect of granting tenants access to adequate housing is fulfilled when they are provided with *adequately habitable housing*<sup>50</sup> that ensures at the very least, a minimum standard of habitability with specific reference to adequate space, protection from weather, promotion of health, and physical safety. In my view, section 26(1) of the Constitution and the CESCR's General Comment 4 as quoted in chapter 2 above properly sanctions a minimum standard, which the state or private landowners need to meet in the context of tenancy. The Constitution underpins the minimum standard by stating that local government must promote a safe and healthy environment.<sup>51</sup> Similarly, the CESCR's General Comment 4 emphasises the need for the provision of effective domestic legal remedies to deal with habitability as a characteristic of the right to adequate housing.<sup>52</sup> The remedies include tenants filing complaints against illegal conduct undertaken or supported by landowners in the public or private sector in terms of rent charged. Moreover, the remedies entail tenants

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<sup>46</sup> Section 26(1) of the Constitution.

<sup>47</sup> See, for example, *Mpange v Sithole* 2007 6 SA 578 (W) paras 50-58.

<sup>48</sup> See *Mpange v Sithole* 2007 6 SA 578 (W) paras 50-51.

<sup>49</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 34-35; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) paras 21 and 32; P de Vos "The Right to Housing" in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 85 92; P de Vos "The Essential Components of the Human Right to Adequate Housing – A South African Perspective" in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002) 23 23-33.

<sup>50</sup> *Malan v City of Cape Town* 2014 6 SA 315 (CC) para 58.

<sup>51</sup> Section 152(1)(d) of the Constitution.

<sup>52</sup> *Mpange v Sithole* 2007 6 SA 578 (W) para 52.

reporting any lack of the maintenance of premises by landowners. Furthermore, tenants lodging complaints to courts or tribunals against landowners regarding unhealthy or inadequate housing conditions is also a remedy.<sup>53</sup>

The court in *Mpange* – a case dealing specifically with tenants – also emphasised that human dignity is fundamentally linked with habitability. In this regard, the court pointed out that:

“[a]s an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution”.<sup>54</sup>

The conditions of the dwelling in *Mpange* were alleged to be illegal, unsafe, unhygienic, and the building was generally in a state of decay and disrepair. The building was unsuitable for human habitation.<sup>55</sup> The landowner had leased the premises to provide residential housing for 133 tenants. The tenants alleged that the premises were unfit for residential accommodation for themselves and their children. The court observed that since the landowner intended to provide the tenants with residential housing, the landowner should have also considered the human dignity of the tenants. In this regard, the landowner could have ensured that municipal connections were made available to tenants who had paid for water and electricity while the municipality was providing the required services. Moreover, as daily living

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<sup>53</sup> CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 17(c)-(e).

<sup>54</sup> *Mpange v Sithole* 2007 6 SA 578 (W) para 53. See also Mohamed *Landlord and Tenant* 44; A Chaskalson “Human Dignity as a Foundational Value of our Constitutional Order” (2000) 16 *South African Journal on Human Rights* 193 196; I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 251; NMI Goolam “Human Dignity – Our Supreme Constitutional Value” (2001) 4 *Potchefstroom Electronic Law Journal* 43 52.

<sup>55</sup> *Mpange v Sithole* 2007 6 SA 578 (W) paras 7 and 29. See further W du Plessis, JM Pienaar & N Olivier “Land Matters: 2007 (2)” (2007) 22 *South African Public Law* 548 571; CG van der Merwe & JM Pienaar “The Law of Property (including Real Security)” (2007) *Annual Survey of South African Law* 978; A Friedman & K Hofmeyr “Constitutional Law” (2007) 4 *Juta's Quarterly Review of South African Law* 2.8; SI Mohamed “Unravelling Rent Contracts” (12-08-2008) *Daily News* <[www.ocr.org.za/property\\_law/Unravelling\\_rent\\_contracts.pdf](http://www.ocr.org.za/property_law/Unravelling_rent_contracts.pdf)> (accessed 05-02-2018).

resulted into the production of garbage, it was the landowner's responsibility to provide the tenants with sufficient refuse bins and to ensure the refuse is collected by the municipality at all times.<sup>56</sup>

As a result of the above, the court properly concluded that conditions that are illegal, unhygienic, unsafe and unsuitable for human habitation create circumstances that fall short of protecting the human dignity of tenants.<sup>57</sup> Generally, the recognition of human dignity as one of the founding values of the Constitution confirms the importance of human dignity as a facet of the use or occupation of dwellings.<sup>58</sup> As Zondo J in *Malan v City of Cape Town* ("*Malan*")<sup>59</sup> succinctly asserted, "[h]aving a home is very important to the dignity of any person".<sup>60</sup> This is because a home is necessary to provide dignity to a person. Consequently, a tenant's human dignity may be affected in instances where: (a) the landowner fails to provide tenants with access to electricity supply, water and toilet facilities; (b) the landowner fails to attend to issues like a leaking roof, broken windows, faulty electric wiring and plumbing; or (c) in cases where the landowner fails to attend to the regular removal of refuse, which creates dirty conditions that cannot be considered adequate.<sup>61</sup> Therefore, linking habitability and

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<sup>56</sup> *Mpange v Sithole* 2007 6 SA 578 (W) paras 5 and 31. See further Du Plessis, Pienaar & Olivier (2007) *South African Public Law* 548 571; Friedman & Hofmeyr (2007) *Juta's Quarterly Review of South African Law* 2.8; Mohamed "Unravelling Rent Contracts" (12-08-2008) *Daily News*.

<sup>57</sup> *Mpange v Sithole* 2007 6 SA 578 (W) para 54. See further T Naudé "The Law of Lease" (2007) *Annual Survey of South African Law* 873; Van der Merwe & Pienaar (2007) *Annual Survey of South African Law* 978; Friedman & Hofmeyr (2007) *Juta's Quarterly Review of South African Law* 2.8; SI Mohamed *The Tenant-Landlord in South Africa* 2 ed (2010) 56; Mohamed "Unravelling Rent Contracts" (12-08-2008) *Daily News*.

<sup>58</sup> Chaskalson (2000) *South African Journal on Human Rights* 193 196 and 204; JM Reyneke "Dignity: The Missing Building Block in South African Schools?" (2010) 35 *Journal for Juridical Science* 71 77; Currie & De Waal *The Bill of Rights Handbook* 250; *Mpange v Sithole* 2007 6 SA 578 (W) para 55.

<sup>59</sup> *Malan v City of Cape Town* 2014 6 SA 315 (CC).

<sup>60</sup> Para 127. See also *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 49, where the court said that housing forms an indispensable part of ensuring human dignity; R Steinmann "The Core Meaning of Human Dignity" (2016) 19 *Potchefstroom Electronic Law Journal* 1 23.

<sup>61</sup> See *Mpange v Sithole* 2007 6 SA 578 (W) para 54; *City of Cape Town v Rudolph* 2004 5 SA 39 (C) 77.

human dignity brings about a stronger constitutional minimum standard of habitability for tenants.

### 3 3 1 *Concluding remarks*

The impact of the Constitution on the standard of habitability for tenants is a positive one in that it ensures the protection and promotion of the rights of tenants in requiring safe and healthy home environments.<sup>62</sup> This is an innovative new dimension of habitability in the context of tenants as indicated in the above discussion. The links are so clear, yet these links have not clearly been made in the context of tenancy. The impact of the Constitution on the standard of habitability is clearly necessitated by section 26(1) of the Constitution and underpinned by section 152(1)(d) of the Constitution.<sup>63</sup> It is clear that habitability forms part of the content of the right to access to adequate housing – but is not exhaustive of its content as there are elements beyond habitability that also form the content of the right. Proximity to work and facilities, would for instance form part of the content of the right and this goes beyond habitability. Therefore, access to adequate housing means that a dwelling must be habitable so that it promotes a safe and healthy living environment for tenants.<sup>64</sup> Although Satchwell J in *Mpange* neglected to point this out in clear terms, it is evident from an analysis of the case that the outcome of the judgment was intended to support the postulation that access to “adequate” housing *includes* habitability as an element of its content.<sup>65</sup> Therefore, it is clear that a minimum standard exists because it can be derived from the Constitution. The next step in the analysis includes an investigation into whether the owner has such an obligation, or whether the state bears the duty to ensure that the minimum standard is fulfilled.

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<sup>62</sup> Section 152(1)(d) of the Constitution.

<sup>63</sup> See chapter 2 part 2 3 1 above.

<sup>64</sup> G van Bueren “Housing” in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (l: 18 2015) 21-8, discussing CESCR’s General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8(d).

<sup>65</sup> See *Mpange v Sithole* 2007 6 SA 578 (W) para 51.



### 3 4 On whom does the obligation rest to ensure habitability in the context of tenants?

#### 3 4 1 Common-law obligation of “fit for the purpose for which the dwelling was rented”

The question into whether the obligation to ensure habitability of the leased premises rests on the owner or the state is particularly important where a landowner has failed to maintain and keep the dwelling in a safe and habitable condition during the term of the lease agreement. Theoretically, when the owner lets the property to the tenant, he promises to give the tenant the entitlements of full use and enjoyment of the property for a limited duration of time.<sup>66</sup> Arguably, as the property is an investment for the landowner, it can be seen as advantageous for the landowner to ensure that the property is not a health hazard or unfit for human habitation.<sup>67</sup>

The obligation to ensure habitability for tenants is essentially based on the common-law obligation to ensure that the premises is fit for the purpose for which it was leased.<sup>68</sup> In this regard, the common law imposes the obligation on a landowner to place and maintain the dwelling in a condition reasonably fit for the purpose.<sup>69</sup> This

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<sup>66</sup> Mohamed *Landlord and Tenant* 39-40; Glover *Kerr's Law of Sale and Lease* 342-352; Viljoen *The Law of Landlord and Tenant* 139; Bradfield & Lehmann *Principles of the Law of Sale & Lease* 138; Cooper *Landlord and Tenant* 38. See further *Gateway Properties (Pty) Ltd v Bright Idea Projects* 249 CC 2014 3 All SA 577 (KZP) para 24; *Mpange v Sithole* 2007 6 SA 578 (W) para 28; *Boyd v Stuttford & Co* 1910 AD 101 116; *Poynton v Cran* 1910 AD 205 221; *Bozzone v Secretary for Inland Revenue* 1975 4 SA 579 (A) 585.

<sup>67</sup> Mohamed (2006) *LexisNexis Butterworths Property Law Digest* 3-6; Mohamed *Tenant and Landlord in South Africa* 32; Mohamed *Rights and Obligations of Landlord and Tenant* 166.

<sup>68</sup> Mohamed *Landlord and Tenant* 42; Mohamed “Safeguards for Tenants ‘Habitability will Replace Fit for the Purpose’ Obligation” (12-11-2014) *Daily News*.

<sup>69</sup> *Mpange v Sithole* 2007 6 SA 578 (W) para 28. See further *Stewart & Co v Executors of Staines* (1861-1863) 4 Searle 152 159-160; *Nannucci v Wilson & Co* (1894) 11 SC 240 244-245; *North Western Hotel Ltd v Rolfes Nebel & Co* 1902 TS 324 333; *Tee v McIlwraith* 1905 19 ECD 282 286; *Jacobson v Bloch* 1906 TS 350 352; *Assignees Kaiser Brothers v Continental Caoutchouc Company* (1906) 23 SC 736 739; *Frenkel & Co v Rand Mines Produce Supply Co* 1909 TS 129 131; *Poynton v Cran* 1910 AD 205 214; *Murman v Minchin* (1905-1910) 10 HCG 313 323-326; *Salmon v Dedlow* 1912 TPD 971 978; *Bosomworth v Labistour* (1914) 35 NPD 79 84; *Bowen v Daverin* 1914 AD 632 650; *Smook v Dreyer* 1918 OPD 1 3-4; *African Theatres Trust Ltd v Estate Mccubbin* (1919) 40 NPD 277 279; *Henning v Le Roux* 1921 CPD 587 590; *Cape Town Municipality v Paine* 1923 AD 207 218; *Amin v Ebrahim* 1926 47 NPD 1 7; *Shapiro v Yutar* 1930 CPD 92 100; *Holborn House Ltd v Katz & Lourie Ltd* 1941 TPD 10 12; *Viljoen v Cleaver* 1945 NPD 332 334; *Marais v Cloete* 1945 EDL



means that the residential dwelling let should be fit for human habitation.<sup>70</sup> It is clear from the literature that regarding internal and external maintenance of the dwelling the landowner is responsible.<sup>71</sup> However, the landowner may be absolved of his common-law obligation to maintain the dwelling if it is stipulated by the parties in the lease agreement.<sup>72</sup> However, under the current constitutional dispensation, the landowner cannot opt-out of a constitutional obligation relating to constitutional rights.<sup>73</sup> In terms

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238 242-243; *Sarkin v Koren* (2) 1949 3 SA 545 (C) 551-552; *Sarkin v Koren* (3) 1950 1 SA 495 (C) 499-500; *Bowman v Stanford* 1950 2 SA 210 (D) 214; *Hunter v Cumnor Investments* 1952 1 SA 735 (C) 740; *Bahadur v Phillipson* 1956 4 SA 638 (FC) 641; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A) 150; *The Treasure Chest v Tambuti Enterprises* 1957 2 SA 738 (A) 744 and 752; *Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 4 SA 391 (D) 393; *Fourie No en 'n Ander v Potgietersrusse Stansraad* 1987 2 SA 921 (A) 931; *Proud Investments (Pty) Ltd v Lanchem Inter (Pty) Ltd* 1991 3 SA 738 (A) 748; *Pete's Warehousing & Sales CC v Bowsink Investments CC* 2000 3 SA 833 (E) 839; *Fourie v Hansen* 2001 2 SA 823 (W) 838; *Gateway Properties (Pty) Ltd v Bright Idea Projects* 249 CC 2014 3 All SA 577 (KZP) paras 22 and 24.

<sup>70</sup> Section 13(4) of the RHA. See also Regulation 6(1)(b)(i) of the Unfair Practice Regulations to the Rental Housing Act 50 of 1999 GN 340 in GG 30863 of 14-03-2008 issued by the Department of Housing; Bradfield & Lehmann *Principles of the Law of Sale & Lease* 144.

<sup>71</sup> Regulation 6(1)(f)-(k) of the Unfair Practice Regulations to the Rental Housing Act 50 of 1999 GN 340 in GG 30863 of 14-03-2008 issued by the Department of Housing. See further Mohamed *Landlord and Tenant* 84-85; Mohamed *Tenant and Landlord in South Africa* 32; SI Mohamed "Remedies for Failures by Landlords" (28-05-2013) *Daily News* <<http://www.iol.co.za/.../remedies-for-failures-by-landlords-1522778>> (accessed 05-02-2018).

<sup>72</sup> Mohamed *Landlord and Tenant* 84; Mohamed *Tenant and Landlord in South Africa* 32; Mohamed "Remedies for Failures by Landlords" (28-05-2013) *Daily News*; D'Amato *The Duties and Rights of Tenants and Landlords under Swiss and South African Law* 14; Bradfield & Lehmann *Principles of the Law of Sale & Lease* 144-145; Glover *Kerr's Law of Sale and Lease* 386-387; Wille *Landlord and Tenant in South Africa* (1910) 269; Wille *Landlord and Tenant in South Africa* 147-150; Cooper *Landlord and Tenant* 112; Viljoen *The Law of Landlord and Tenant* 207; *Jacobson v Bloch* 1906 TS 350 352-353. See further *Poynton v Cran* 1910 AD 205 221, where the court said that the obligation to maintain the property can be changed by an expressed or implied provision in the lease. However, the onus is on the landowner to prove the nature of the agreement. The same point was made in *Cape Town Municipality v Paine* 1923 AD 207 218; *Sarkin v Koren* (2) 1949 3 SA 545 (C) 552; *Sarkin v Koren* (3) 1950 1 SA 495 (C) 449.

<sup>73</sup> See section 8(2), read in conjunction with section 39(2) of the Constitution. See also *Mpange v Sithole* 2007 6 SA 578 (W) paras 49-50 and 71-74; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 319.

of the common-law obligation of maintenance, advisably the parties should ensure that the terms and conditions of the lease contract set out their undertaking as to the maintenance of the dwelling unambiguously. Thus if the undertaking is unclear, such an omission to stipulate clearly has normally driven the courts to strictly interpret the terms and conditions of the lease agreement in favour of the tenant.<sup>74</sup> As such, the landowner retains his obligation to maintain the dwelling in a condition reasonably fit for the purpose.<sup>75</sup>

It is fair to point out that the landowner's obligation to maintain the existing structure of the dwelling in a condition reasonably fit for the purpose does not include situations where the tenants, or his or her household and visitors, negligently or intentionally caused the dwelling to become uninhabitable.<sup>76</sup> Therefore, the obligation of the

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<sup>74</sup> *Poynton v Cran* 1910 AD 205 215; *Shapiro v Yutar* 1930 CPD 92 101; *Bhyat v Commissioner for Immigration* 1932 AD 125 129; *Holborn House Ltd v Katz & Lourie* 1941 TPD 10 12-13; *Adams v O'Leary* 1945 NPD 147 150; *Sarkin v Koren* (2) 1949 3 SA 545 (C) 551-552; *Sarkin v Koren* (3) 1950 1 SA 495 (C) 449; *Bowman v Stanford* 1950 2 SA 210 (D) 214; *Pete's Warehousing & Sales CC v Bowsink Investments CC* 2000 3 SA 833 (E) 839; *Canada Steamship Lines Ltd v The King* (1952) 1 All ER 305 (PC) 310; *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 2 SA 794 (A) 803-804; *Durban's Water Wonderland (Pty) Limited v Botha* 1999 1 SA 982 (SCA) 989; *Swinburne v Newbee Investments (Pty) Ltd* 2010 5 SA 296 (KZD) 306-331; *South African Railways & Harbours v Lyle Shipping Co Limited* 1958 3 SA 416 (A) 419; *First National Bank of SA Limited v Rosenblum* 2001 4 SA 189 (SCA) para 6; *Van der Westhuizen v Arnold* 2002 6 SA 453 (SCA) para 40; *Drifters Adventure Tours CC v Hircock* 2007 2 SA 83 (SCA) paras 9-16.

<sup>75</sup> *Poynton v Cran* 1910 AD 205 214, 221 and 224; *Cape Town Municipality v Paine* 1923 AD 207 218; *Shapiro v Yutar* 1930 CPD 92 101; *Sarkin v Koren* (2) 1949 3 SA 545 (C) 551-552; *Pete's Warehousing & Sales CC v Bowsink Investments CC* 2000 3 SA 833 (E) 839. See further Glover Kerr's *Law of Sale and Lease* 387; Viljoen *The Law of Landlord and Tenant* 207; Wille *Landlord and Tenant in South Africa* (1910) 269; Wille *Landlord and Tenant in South Africa* 149-150; Mohamed *Landlord and Tenant* 85.

<sup>76</sup> *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957 963-965 and 975; *Hayes v McNally* 1910 TS 326 330-333; *Groenewald v Duvenhage* 1915 OPD 25 29-30; *Von Holdt v Bruwer* 1918 CPD 163 167; *Eensaam Syndicate v Moore* 1920 AD 457 458; *Bresky v Vivier* 1928 CPD 202 204-205; *Getz v Pahlavi* 1943 WLD 142 145; *Brand v Kotze* 1948 3 SA 769 (C) 770-771; *South British Insurance Company v Du Toit* 1952 4 SA 313 (SR) 315-318; *Kealey v Landsberg* 1953 4 SA 605 (C) 609-613; *Nel v Dobie* 1966 3 SA 352 (N) 355-356. See further Bradfield & Lehmann *Principles of the Law of Sale & Lease* 145; Glover Kerr's *Law of Sale and Lease* 391; Cooper *Landlord and Tenant* 99 and 223-233; Wille *Landlord and Tenant in South Africa* (1910) 269-270; Wille *Landlord and Tenant in South Africa* 242-243; C Hugo &

landowner to place and maintain the dwelling in a condition that is reasonably fit for the purpose for which the property was rented will apply in each case.

Defects caused by disrepair, deterioration, depreciation due to age, and action of weather or fair use, which may render the dwelling unfit for the purpose, are the obligation of the landowner to repair.<sup>77</sup> The repair of such defects or flaws in the premises should be put in good order by the landowner if the defect or flaw unreasonably disturbs the tenant from properly using and enjoying the dwelling for the purpose for which it was let. However, the landowner does not have to effect structural alterations or improvements.<sup>78</sup> As previously mentioned, the principle is that the tenant is entitled to the use and enjoyment of the property he has let. As such, the use of the property leased is diminished if the dwelling is in a state of disrepair and not reasonably fit for its intended purpose.<sup>79</sup>

For instance, in *Poynton v Cran* (“*Poynton*”)<sup>80</sup> the premises and a warmer required necessary repairs.<sup>81</sup> The court remarked that the landowner was obliged to place the

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P Simpson “Lease” in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective Property and Obligations in Scotland and South Africa* (2005) 326.

<sup>77</sup> Regulation 6(1)(i) of the Unfair Practice Regulations to the Rental Housing Act 50 of 1999 GN 340 in GG 30863 of 14-03-2008 issued by the Department of Housing. See further *Radloff v Kaplan* 1914 EDL 357 361; *African Theatres Trust Ltd v Estate Mccubbin* (1919) 40 NPD 277 281-282; AJ Kerr & G Glover “Lease” in WA Joubert & JA Faris (eds) *The Law of South Africa* 2 ed (2007) para 13; Van der Merwe “Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew” in *The Common Core of European Private Law Time Limited Interests in Land* 262; Wille *Landlord and Tenant in South Africa* 146; Cooper *Landlord and Tenant* 99; JF Coaker & DT Zeffertt Wille & Millin’s *Mercantile Law of South Africa* 18 ed (1984) 313; Mohamed *Rights and Obligations of Landlord and Tenant* 168; D’Amato *The Duties and Rights of Tenants and Landlords under Swiss and South African Law* 13.

<sup>78</sup> Van der Merwe “Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew” in *The Common Core of European Private Law Time Limited Interests in Land* 262; Wille *Landlord and Tenant in South Africa* 146; Cooper *Landlord and Tenant* 99; Sharrock *Business Transactions Law* 326; JF Coaker & DT Zeffertt Wille & Millin’s *Mercantile Law of South Africa* 18 ed (1984) 313; *Poynton v Cran* 1910 AD 205 227; *Bahadur v Phillipson* 1956 4 SA 638 (FC) 641; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A) 150.

<sup>79</sup> *Poynton v Cran* 1910 AD 205 221; *Holborn House Ltd v Katz & Lourie Ltd* 1941 TPD 10 12; *Marais v Cloete* 1945 EDL 238 242; *Fourie No en ‘n Ander v Potgietersrusse Stansraad* 1987 2 SA 921 (A) 931; Visser et al *Gibson South African Mercantile and Company Law* 174.

<sup>80</sup> *Poynton v Cran* 1910 AD 205.

<sup>81</sup> 210.

premises and a broken warmer forming part of the lease agreement in a condition that makes it reasonably fit for use by the tenant.<sup>82</sup> This holding in *Poynton* confirms that the landowner has the obligation to ensure that the dwelling is habitable. Similarly, in the case of *African Theatres Trust Ltd v Estate McCubbin* (“*McCubbin*”),<sup>83</sup> the court reaffirmed that deficient guttering (like any other thing connected to a house) should be renewed or replaced by the landowner with new parts to keep the premises fit for occupation.<sup>84</sup> Therefore, a property owner should replace worn-out guttering due to reasonable wear and tear, which no longer transports rainwater properly and causes damage to the house and its furniture during rainy seasons as it makes the dwelling unfit for purpose. This is especially so if that guttering cannot be repaired by the landowner through patching or portions thereof being taken out and replaced with new ones.<sup>85</sup>

In *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* (“*Harlin Properties*”),<sup>86</sup> the court also dealt with the obligation that is placed on the landowner to effect necessary repairs. In *Harlin Properties*, the tenant found out that the building was not structurally sound in that it contained structural defects in the form of cracked floors, ceilings, walls, roofs and parapets of the building.<sup>87</sup> As a result of these structural defects and damp from rainy weather conditions, the premises were unfit for human habitation. Beyers JA referred with approval to *Poynton*<sup>88</sup> and held that structural alterations should be made by the landowner in the premises because the defective parts in the premises unreasonably impeded on the tenant’s use and enjoyment of the

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<sup>82</sup> 214.

<sup>83</sup> *African Theatres Trust Ltd v Estate Mccubbin* (1919) 40 NPD 277.

<sup>84</sup> 279-280. See further Van der Merwe “Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew” in *The Common Core of European Private Law Time Limited Interests in Land* 262; Cooper *Landlord and Tenant* 99. In *Poynton v Cran* 1910 AD 205 230, the court found that a corroded boiler, a cracked geyser or broken pipe was only practical for it to be replaced by the landowner with new parts. Similarly, in *Sarkin v Koren (1)* 1948 4 SA 438 (C) 445, the court said that proper repairs involve making replacements by the landowner.

<sup>85</sup> *African Theatres Trust Ltd v Estate Mccubbin* (1919) 40 NPD 277 278-282. See also Van der Merwe “Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew” in *The Common Core of European Private Law Time Limited Interests in Land* (2012) 262-263.

<sup>86</sup> *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A).

<sup>87</sup> 148 and 151. See also Sharrock *Business Transactions Law* 326.

<sup>88</sup> *Poynton v Cran* 1910 AD 205 227.

property for the purpose for which it was let.<sup>89</sup> Consequently, the court in *Harlin Properties* endorsed the fact that in some instances it would be essential for the landowner to effect structural improvements so that the tenant may have the necessary use and enjoyment of the property as intended in terms of the leased agreement.

*Salmon v Dedlow* (“*Salmon*”)<sup>90</sup> is another case where the court alluded to the obligation of the owner to ensure that the property let is fit for the purpose. In this case, the guttering of the property was not sufficient enough to carry off rainwater from the roof, especially during heavy rainstorms.<sup>91</sup> Thus during a rainstorm, excessive water entered through the roof and ceiling, flooding the leased house and causing damage to the tenant’s belongings in the house.<sup>92</sup> The court held that where the roof of a house had leakages due to a structural defect, the landowner must make such repairs to the roof, doors or windows as it is necessary to prevent the rainwater from entering the house, causing damage and affecting the tenant’s occupation of the property.<sup>93</sup> In light of the finding in *Salmon*, the obligation to ensure that a dwelling is habitable rests on the owner.

*Mpange* is yet another case in which the court highlighted the obligation that rests on a landowner to make necessary repairs on the property that is rented out. In this case, the court found that since the premises were let by the landowner for the specific purpose of providing the tenants with residential accommodation, the landowner was obliged to effect necessary repairs to put the premises in a proper and habitable condition and to maintain the premises in the same condition.<sup>94</sup> It is clear from the above principles that the landowner is responsible to place and maintain the dwelling in a condition that is reasonably fit for the purpose for which it was rented. However, the landowner is not obliged to effect repairs that are simply required for the more

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<sup>89</sup> *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A) 150. See also *Bowen v Daverin* 1914 AD 632 650.

<sup>90</sup> *Salmon v Dedlow* 1912 TPD 971.

<sup>91</sup> 975.

<sup>92</sup> 974.

<sup>93</sup> 978. See also *Shapiro v Yutar* 1930 CPD 92 97, where the court mentioned that the landowner should ensure that the building is closed and covered to protect the tenant, and make such necessary repairs to stop the rain from coming into the building; Wille *Landlord and Tenant in South Africa* 146-147; Glover *Kerr’s Law of Sale and Lease* 391.

<sup>94</sup> *Mpange v Sithole* 2007 6 SA 578 (W) paras 28-32.



efficient working of the premises in the leased property.<sup>95</sup> Now that this part has shown that the common-law obligation primarily rests on the landowner to ensure habitability in the context of tenants' dwellings, the subsection that follows indicates the impact of the RHA on the common-law obligation.

### 3 4 2 *The impact of the Rental Housing Act*

Apart from the common law as outlined above, the obligation of the landowner in terms of residential leases is regulated by the RHA. In section 13(4) of the RHA, read together with the regulations promulgated in terms of the RHA, the landowner is required to place and maintain the property to be let in an acceptable living condition so that it is fit for human habitation.<sup>96</sup> This expressly confirms the common-law *fit for purpose* obligation. However, the RHA does not specifically and expressly incorporate the common-law obligation of habitability that was developed in cases like *Mpange*. That is, the landowner should provide tenants with adequate space, protection from the elements, threats to health, safety and premises that are free from defects.<sup>97</sup>

In terms of section 2 of the RHA, the state is also responsible to promote rental housing. For example, this would ordinarily apply in instances where constitutional rights like the right to access to adequate housing or human dignity are implicated. Thus, the state must be concerned with the well-being of tenants and promote rental housing by improving the living conditions of tenants in the rental housing market.<sup>98</sup>

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<sup>95</sup> *Wille Landlord and Tenant in South Africa* 147; *Poynton v Cran* 1910 AD 205 227; *Bowen v Daverin* 1914 AD 632 650.

<sup>96</sup> Section 13(4) of the RHA. See further Regulation 6(1)(b)(i) of the Unfair Practice Regulations to the Rental Housing Act 50 of 1999 GN 340 in GG 30863 of 14-03-2008 issued by the Department of Housing; Regulation 7(1)(b)(i) of the Gauteng Unfair Practice Regulations, promulgated under and in terms of the Rental Housing Act 50 of 1999 GN 4004 in GG 30863 of 04-07-2001, as amended by GN 1472 of 04-06-2002; Regulation 4(1)(a)(i) of the Western Cape Unfair Practice Regulations, made in terms of the Rental Housing Act 50 of 1999 GN 5822 in GG 20726 of 01-02-2002.

<sup>97</sup> *Mpange v Sithole* 2007 6 SA 578 (W) paras 28 and 51; Mohamed "Fit to Let Doesn't Mean Habitable" (10-04-2012) *Daily News*.

<sup>98</sup> Section 2(1)(a)(i) of the RHA. See further PN Stoop "The South African Law of Lease and Socioeconomic Rights" (2013) 6 *International Journal of Private Law* 329 337-338. See also section 7 of the Constitution; section 152(1)(d) of the Constitution; section 2(1)(h) of the HA; *Malan v City of Cape Town* 2014 6 SA 315 (CC) paras 56 and 58; *Mpange v Sithole* 2007 6 SA 578 (W) para 54.

That is, maintaining habitable public or private residential housing to ensure that tenants progressively have access to rental housing for the duration of the lease, the tenants are provided with adequate protection from the elements and have safe and healthy living conditions to ensure the elimination and prevention of uninhabitable conditions.<sup>99</sup> This is because in instances where constitutional rights are at stake there is a need for the state to fulfil its constitutional obligation to provide adequately habitable housing to tenants.<sup>100</sup> As the RHA does not amend or override the common-law obligation of fit for the purpose, Parliament has intervened again in terms of the RHAA to protect the interest of tenants in view of the challenges that tenants face relating to the maintenance of leased properties. The next subsection indicates the impact of the RHAA on the existing common-law obligation of fit for the purpose that was confirmed by the RHA.

### 3 4 3 *The impact of the Rental Housing Amendment Act*

The common-law obligation of the landowner – as outlined above – will (perhaps more deliberately and expressly), be enshrined in section 4B(11) of the RHAA once this Act comes into force.<sup>101</sup> This section will make it compulsory for the landowner to provide tenants with a dwelling that is in a habitable condition. This will be a statutory warranty of habitability.<sup>102</sup> The landowner should ensure that the dwelling to be let is delivered in a habitable condition. This will give tenants the power to bargain for adequate habitable housing, and not accept property that is unsafe, inadequate or uninhabitable.

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<sup>99</sup> Section 1, read together with section 2(1)(e)(iii) and (h)(i) of the HA; section 9(1)(a)(i) and (ii) of the HA; section 152(1)(d) of the Constitution. See further *Malan v City of Cape Town* 2014 6 SA 315 (CC) para 56; Stoop (2014) *Annual Survey of South African Law* 820; CG van der Merwe & JM Pienaar “The Law of Property (including Real Security)” (2006) *Annual Survey of South African Law* 369-370.

<sup>100</sup> Section 7(2), read together with section 26 of the Constitution; supported by section 152(1)(d) of the Constitution; section 2(1)(h) of the HA; section 2 of the RHA. See further Stoop (2013) *International Journal of Private Law* 329 337-338; *Mpange v Sithole* 2007 6 SA 578 (W) para 54; *Malan v City of Cape Town* 2014 6 SA 315 (CC) paras 56, 58, 119 and 124.

<sup>101</sup> Glover *Kerr’s Law of Sale and Lease* 385; Bapela & Stoop (2016) *De Rebus* 19; Viljoen *The Law of Landlord and Tenant* 200; Mohamed *Landlord and Tenant* 84.

<sup>102</sup> Viljoen *The Law of Landlord and Tenant* 200; Glover *Kerr’s Law of Sale and Lease* 385; Bapela & Stoop (2016) *De Rebus* 19; Stoop (2014) *Annual Survey of South African Law* 810; Mohamed *Landlord and Tenant* 45; Mohamed “Fit to Let Doesn’t Mean Habitable” (10-04-2012) *Daily News*.



Apart from the landowner placing the tenants in a habitable dwelling, section 4B(11) of the RHAA will require that the landowner also maintain the existing structure of the dwelling in a habitable condition throughout the lease. In this regard, the RHAA added a new meaning of “maintain”. This meaning indicates that the landowner should make repairs and keep the dwelling in good condition, as it may be reasonably necessary for the tenant to use the dwelling in a habitable condition.<sup>103</sup> The statutory obligation on the part of the landowner to place and maintain the existing structure of the dwelling in a habitable state (once the RHAA takes effect)<sup>104</sup> will override the tenants’ ability to accept a dwelling that is in a state of disrepair because the RHAA does not allow for that. Furthermore, tenants will no longer be able to take over the landowner’s common-law obligation to maintain the dwelling by contracting outside the common law.<sup>105</sup> This means that landowners will no longer be able to hold all the aces in respect of the condition and undertaking to maintain the property that is subject to a lease agreement.<sup>106</sup> In light of section 4B(11) of the RHAA, the obligation to provide and maintain the dwelling in a habitable condition will apply to every case and it will not depend on the circumstances of each case.

In the final instance, section 4B(11) of the RHAA will require the landowner *where possible* to facilitate the provision of basic services to the dwelling.<sup>107</sup> The contours of

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<sup>103</sup> Section 1 of the RHAA. See further Viljoen *The Law of Landlord and Tenant* 200-201; Glover *Kerr’s Law of Sale and Lease* 385-387; Van der Merwe & Pienaar (2014) *Annual Survey of South African Law* 844; Stoop (2014) *Annual Survey of South African Law* 811; Mohamed *Landlord and Tenant* 84; Mohamed “Safeguards for Tenants ‘Habitability will Replace Fit for the Purpose’ Obligation” (12-11-2014) *Daily News*.

<sup>104</sup> The RHAA has been assented to Parliament and signed by the President. However, the date on which the RHAA will come into operation is yet to be announced and there is no clarity as to when that will be done or why it has not come into operation yet. In the meantime, the common law applies as it stands.

<sup>105</sup> Viljoen *The Law of Landlord and Tenant* 201; Glover *Kerr’s Law of Sale and Lease* 385-387; Mohamed *Landlord and Tenant* 85; Mohamed “Safeguards for Tenants ‘Habitability will Replace Fit for the Purpose’ Obligation” (12-11-2014) *Daily News*.

<sup>106</sup> Mohamed *Landlord and Tenant* 85; SI Mohamed “Landlords Hold all the Aces” (21-08-2012) *Daily News* <<http://www.iol.co.za/.../consumer/landlords-hold-all-the-aces-1366479>> (05-02-2018), he writes about the challenges faced by tenants in the rental housing market, but the position will soon change upon the operation of the RHAA; Mohamed “Safeguards for Tenants ‘Habitability will Replace Fit for the Purpose’ Obligation” (12-11-2014) *Daily News*.

<sup>107</sup> Section 4B(11) of the RHAA. See further Viljoen *The Law of Landlord and Tenant* 200; Glover *Kerr’s Law of Sale and Lease* 387; Stoop (2014) *Annual Survey of South African Law* 811; Mohamed *Landlord and Tenant* 84.

where it will be possible (or not) for the landowner to provide basic facilities has not been defined in the RHAA or literature. That may be because the tenant's entitlement to basic services will not be absolute.<sup>108</sup> It is limited to the extent that the landowner can aid in the provision of basic services. In other words, what can be possible to provide by one landowner may not be possible for another. Nonetheless, the provision of basic amenities such as water, electricity, regular refuse removal, sufficient and hygienic lavatory facilities or any other essential service that is necessary for the tenant to use the dwelling in a habitable condition should, as a point of departure, be provided by the landowner. However, where there is a just cause for non-provision of basic facilities, the courts or tribunals will not hold the landowner liable because the landowner is only under the duty to assist in providing basic amenities where it is reasonably possible to do so.<sup>109</sup> The duty of the landowner to facilitate basic services to the dwelling *where possible* (once the RHAA is signed into law) will have implications on the tenants' common law entitlement of undisturbed use and enjoyment of the dwelling. For instance, if it becomes impossible, for whatever reason, for the landowner to provide basic services to the tenants, the use and enjoyment of the dwelling are diminished. In these instances, tenants will not easily have recourse to the common law remedies like the reduction of rent because the phrase "where possible" in the RHAA suggests that if the landowner proves impossibility to perform, an order of reduction of rent may *not* be granted against the landowner.<sup>110</sup> However, it remains to be seen how this phrase will be interpreted in practice.

A failure by the landowner to comply with the obligation of habitability is an offence. Thus, if the landowner is found guilty of contravening the habitability obligation he will be liable upon conviction to either a fine or imprisonment not exceeding two years or be liable for both a fine and imprisonment in terms of the RHAA.<sup>111</sup> Consequently, whether the courts will impose a fine or imprisonment will depend on the circumstances of each case and how the court will exercise its discretion. However, it seems likely that liability for failure to ensure habitability will often result in fines and

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<sup>108</sup> Stoop (2014) *Annual Survey of South African Law* 811.

<sup>109</sup> 811-812.

<sup>110</sup> 812.

<sup>111</sup> See section 16(aB) of the RHAA. See also Bapela & Stoop (2016) *De Rebus* 19; Stoop (2014) *Annual Survey of South African Law* 813 and 818.

not imprisonment, although imprisonment remains a possibility.<sup>112</sup> However, this does not mean that the landowner as a first-time offender will not be punished if he has neglected to ensure that the dwelling is habitable. Nonetheless, aggravating factors such as a previous conviction of the landowner,<sup>113</sup> or the dwelling being in dire need of repairs to make it habitable, should be sufficient reason to imprison the landowner for contravening section 4B(11) of the RHAA. The phrase “dire need of repairs” is set to mean property that seriously or urgently requires repairs, with the effect of exposing the tenants to unnecessary risk to injury or damage to life or property.<sup>114</sup> Therefore, imprisonment should be used as a deterrent where the condition of the dwelling, on assessment by an expert, is a health hazard and unfit for human habitation.

#### 3 4 4 *Concluding remarks*

As the law currently stands, landowners who rent residential property to tenants are obliged to place and maintain that property in a fit for the purpose condition in terms of the common law, unless the landowner’s common-law obligation has been expressly waived by the parties. The RHA reaffirms the common-law fit for purpose obligation. However, once the RHAA comes into effect the existing common-law obligation of fit for the purpose will be amended. In this regard, the RHAA will replace the fit for purpose obligation with habitability. In terms of the RHAA, habitability will now be a statutory requirement, which will form the basis of leasing of property. As such, it will be mandatory for the landowner to provide and maintain the dwelling in a habitable condition. Moreover, the landowner will provide tenants with access to basic amenities where it is possible. Furthermore, the RHAA will extend the nature of offences to include a fine or imprisonment, or both, for providing tenants with uninhabitable dwellings and failing to maintain the dwellings in terms of the required standard of habitability.

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<sup>112</sup> This may be because of a mitigating factor, such as the landowner is a first-time offender.

<sup>113</sup> SS Terblanche “The Sentence” in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 381 and 385.

<sup>114</sup> In terms of PIE, a building is in need of dire repairs if it poses “real and imminent danger of substantial injury or damage to any person or property”. In terms of NBRBSA, property is in dire need of repairs if it is “dilapidated or in a state of disrepair or shows signs thereof”, or “is dangerous or is showing signs of becoming dangerous to life or property”.

### 3 5 Conclusion

The meaning and obligation of habitability in the context of tenants are essentially based on the common-law fit for the purpose principle. This means that the common law specifically requires the property that is let to be in a condition that is reasonably fit for the purpose for which it was rented. As such, the landowner is obliged to guarantee the condition of the property and its maintenance (but subject to the terms of the lease) under the fit for the purpose requirement. This confirms the existing common law standard in this context. There is no real difference between the common law and the RHA with regard to the standard of habitability. The RHA provides for the same standard of habitability. In the RHAA, the standard of habitability will be deliberately and explicitly stated. In essence, the RHAA will inform tenants about what aspects to take into account when accepting property in terms of a lease agreement.

In light of the cases decided in terms of the common-law fit for the purpose requirement, these cases endorse the meaning of habitability as envisaged in terms of the RHAA even though the cases were not brought in terms of the Amendment Act. Thus, interestingly, the elements of habitability were already applied by the court even though the RHAA – which has a specific definition of habitability unlike the common law – is not yet in operation. Therefore, the pronouncements made by courts seem to indicate that habitability forms part of our common-law fit for the purpose requirement.

It is clear that the obligation towards the condition and maintenance of the property lies with the landowner both under the common law and the RHAA, but the landowner does not guarantee the same thing. In terms of the common law, he guarantees that the property is fit to let, while he guarantees that the property is habitable for rental under the RHAA. Accordingly, a warranty by the landowner that property is fit to let is not *essentially* the same as a property being habitable.

The landowner is also responsible in terms of section 26(1) of the Constitution to provide tenants with habitable living conditions. This can be achieved by providing tenants with access to adequate rental housing with the same minimum standard of habitability as described in the RHAA and the CESCR's General Comment 4.<sup>115</sup> The impact of the Constitution on the standard of habitability in the context of tenants is that every tenant has the right to access to adequate housing, which includes the right

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<sup>115</sup> See chapter 2 and 3 above.

of access to habitable housing.<sup>116</sup> As such, all tenants should arguably be assisted by the state to live in habitable conditions in instances where constitutional rights are at stake.<sup>117</sup> However, the state, through reasonable legislative and other measures like the RHA or RHAA, has enjoined private landowners to provide tenants with rental housing that is in a habitable condition so as to achieve the progressive realisation of the right to access to adequate housing. Therefore, both the state and the landowner should not impair the tenants' rights to a habitable home.<sup>118</sup> This means that where the property rented is in a state of disrepair, it may amount to a breach of the underlying lease agreement.

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<sup>116</sup> See chapter 3 above.

<sup>117</sup> See chapter 3 above.

<sup>118</sup> See chapter 2 and 3 above.

## CHAPTER 4: HABITABILITY IN THE CONTEXT OF USUFRUCTUARIES

### 4 1 Introduction

A usufruct is a legal construct mostly created by testamentary will,<sup>1</sup> but it is also possible to establish it between living parties in terms of a contractual agreement.<sup>2</sup> It cannot exist beyond the lifetime of the usufructuary as it is a personal servitude attached to the usufructuary in his or her personal capacity.<sup>3</sup> A usufruct is a personal

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<sup>1</sup> MM Corbett “Usufruct, *Usus* and *Habitatio*” in HR Hahlo, MM Corbett, G Hofmeyr & E Kahn (eds) *The Law of Succession in South Africa* 2 ed (2001) 366 367; Van der Walt *The Law of Servitudes* 465; G Muller, R Brits, JM Pienaar & Z Boggenpoel *Silberberg and Schoeman’s The Law of Property* 6 ed (2019) 382-383; MJ de Waal & MC Schoeman-Malan *The Law of Succession* 4 ed (2008) 165; CG Hall & EA Kellaway *Servitudes* 3 ed (1973) 165; RW Lee *An Introduction to Roman-Dutch Law* 4 ed (1946) 181 and 184; S Viljoen & J Strydom “Tenure Security and the Reform of Servitude Law” in G Muller, R Brits, B Slade & J van Wyk (eds) *Transformative Property Law: Festschrift in Honour of AJ van der Walt* (2018) 105; L Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* LLD dissertation, Stellenbosch University (2015) 45.

<sup>2</sup> For an example of a usufruct constituted between living people, see generally *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras 1-5; *Master v African Mines Corporation Ltd* 1907 TS 925 927 and 929.

<sup>3</sup> See *Bhamjee en v Mergold Beleggings (Edms) Bpk* 1983 4 SA 555 (T) 557 and 563; *Union Government (Minister of Finance) v De Kock* NO 1918 AD 22 45; *Lorentz v Melle* 1978 3 SA 1044 (T) 1049; *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 4 SA 174 (E) 178; *Felix en 'n ander v Nortier* NO en andere [1996] 3 All SA 143 (SE) 148; *Van Rensburg v Koekemoer* 2011 1 SA 118 (GSJ) para 14-17; *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* 2011 2 SA 157 (SCA) para 31-32; Section 66 of the Deed Registries Act 47 1937 (“DRA”) provides that no personal servitude of, inter alia, usufruct purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered, nor may a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby, be registered. See further Muller et al *Silberberg and Schoeman’s The Law of Property* 383; CG van der Merwe “Case 1: Various Instances of Time-Limited Interests” in CG van der Merwe & A Verbeke (eds) *The Common Core of European Private Law Time Limited Interests in Land* (2012) 125; CG van der Merwe & MJ de Waal “Servitudes” in WA Joubert & JA Faris *The Law of South Africa* 2 ed Vol 24 (2010) para 581; CG van der Merwe, MJ de Waal & DL Carey Miller *International Encyclopaedia of Laws* (2004) 442; Corbett “Usufruct, *Usus* and *Habitatio*” in *The Law of Succession in South Africa* 367; Van der Walt *The Law of Servitudes* 455-456 and 464; AJ van der Walt “Property” (2011) 1 *Juta’s Quarterly Review of South African Law* 2.2.1; CG van der Merwe & A Pope “Servitudes and Other Real Rights” in F du Bois (ed) *Willie’s Principles of South African Law* 9 ed (2007) 591 605; RP Pace “Usufruct” in RP Pace & WM van der Westhuizen (eds) *Wills and Trusts* (SI: 21 1995) 114; H



servitude that may be granted over immovable property with the effect of giving the usufructuary a limited real right to use and enjoy the property. The use and enjoyment of the property must be exercised in such a way that the nature of the property remains protected or preserved until such time that the property is given back to the owner.<sup>4</sup> The meaning of habitability of dwellings in the context of usufructuaries is not defined in legislation. However, there are common law principles that signal habitability to

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Mostert, A Pope, P Badenhorst, W Freedman, JM Pienaar & J van Wyk *The Principles of the Law of Property in South Africa* (2010) 249; Hall & Kellaway *Servitudes* 1-5 and 165-166; Lee *An Introduction to Roman-Dutch Law* 181; WM Gordon & MJ de Waal "Servitudes and Real Burdens" in R Zimmermann, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective Property and Obligations in Scotland and South Africa* (2005) 735 753; MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 785 811 and 813; Viljoen & Strydom "Tenure Security and the Reform of Servitude Law" in *Transformative Property Law: Festschrift in Honour of AJ van der Walt* 103-104.

<sup>4</sup> Van der Walt *The Law of Servitudes* 464; Hall & Kellaway *Servitudes* 164-165; Van der Merwe & De Waal "Servitudes" in *The Law of South Africa* para 581; Pace "Usufruct" in *Wills and Trusts* 114; CG van der Merwe & MJ de Waal *The Law of Things and Servitudes* (1993) 210; Muller et al *Silberberg and Schoeman's The Law of Property* 383; Van der Merwe & Pope "Servitudes and Other Real Rights" in *Willie's Principles of South African Law* 604-605; Corbett "Usufruct, *Usus* and *Habitatio*" in *The Law of Succession in South Africa* 366; De Waal "Servitudes" in *Southern Cross: Civil Law and Common Law in South Africa* 809-811; Van der Merwe "Case 1: Various Instances of Time-Limited Interests" in *The Common Core of European Private Law Time Limited Interests in Land* 125; CG van der Merwe "Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew" in CG van der Merwe & A Verbeke (eds) *The Common Core of European Private Law Time Limited Interests in Land* (2012) 265-266; R Sharrock *Business Transactions Law* 8 ed (2011) 892; De Waal & Schoeman-Malan *The Law of Succession* 166; Mostert et al *The Principles of the Law of Property in South Africa* 248; Gordon & De Waal "Servitudes and Real Burdens" in *Mixed Legal Systems in Comparative Perspective Property and Obligations in Scotland and South Africa* (2005) 735 755; G Steyn *The Law of Wills in South Africa* 2 ed (1948) 380; Lee *An Introduction to Roman-Dutch Law* 181; D Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* (2010) 24-1; G Muller "To Fell or Not to Fell: The Impact of NEMBA on the Rights and Obligations of a Usufructuary" (2018) 81 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 529 529; A Apers & AL Verbeke "Modern Usufruct – Empowering the Usufructuary" (2014) *Tydskrif vir die Suid-Afrikaanse Reg* 117 117; Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 45; *Master v African Mines Corporation Ltd* 1907 TS 925 927; *Day's Trustees v Registrar of Deeds* 1910 CPD 361 367; *Fourie v Munnik* 1919 OPD 73 79; *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 174; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 8.

mean a usufruct dwelling that is fit for human habitation.<sup>5</sup> It is trite that in granting the limited real right of a usufruct, the owner gives the usufructuary the complete and undisturbed use and enjoyment of the usufruct dwelling. This is subject to the condition that the substance of the dwelling is well-looked-after by the usufructuary and returned to the owner when the usufruct comes to an end.<sup>6</sup> Moreover, it can be expected of the owner to provide more entitlements or rights in terms of the notion of habitability or use and enjoyment. This may include accessories, which are reasonably necessary for the use and enjoyment of the dwelling, or that make the dwelling habitable.<sup>7</sup> Therefore, the owner who grants the limited real right of usufruct should ensure that the property is in a habitable condition to ensure that the usufructuary is able to use and enjoy the usufruct dwelling. This flows from the premise that the extraordinary repairs, which preserve the usufruct dwelling in a habitable standard, ordinarily rests upon the owner.<sup>8</sup> Hence, the habitability of dwellings that are subject to a usufruct will be considered against this brief background.

The first part of chapter 4 will look at the meaning of habitability of dwellings that are subject to a usufruct, and whether the owner can be expected to give usufructuaries other entitlements or rights in light of the notion of habitability. The reason for this is to determine whether a specific standard of habitability already exists for usufructuaries in terms of the common law. It is assumed that usufructuaries are entitled to use and enjoy the usufruct dwelling belonging to the owner, which may imply some standard of habitability of the dwelling, but this is not altogether clear and the idea will have to be unpacked further in the chapter.

Subsequently, the second portion of chapter 4 will scrutinise the impact of the Constitution on the standard of habitability for usufructuaries in light of the constitutional rights to access to adequate housing and human dignity. In line with what is argued in chapter 2 of the dissertation, the assumption is that a link exists between habitability and the right to access to adequate housing and human dignity as enshrined in the Constitution. Although that link has not been made before or seen

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<sup>5</sup> See part 4 2 below.

<sup>6</sup> See part 4 2 below.

<sup>7</sup> See part 4 2 below.

<sup>8</sup> See part 4 4 below.

in a case dealing with a usufruct, it will be argued that such a link in fact implies a minimum standard of habitability in this particular context.

The third section of chapter 4 will, in turn, investigate on whom the obligation rests to ensure habitability. More specifically, it will question whether such an obligation rests on the owner who granted the usufruct, or on the occupier in line with the common law. Alternatively, it will be questioned whether the state can be expected to have any obligation to ensure that usufruct dwellings are habitable. The assumption is that the obligation to ensure habitability in the context of usufructuaries rests on the owner in so far as that obligation ensures the promotion of safe and suitable living conditions for usufructuaries.

## 4 2 Meaning of habitability in the context of usufructuaries

There is no clear or exact meaning of habitability in the case of dwellings occupied by usufructuaries, but literature and case law seem to focus on ensuring that a dwelling is habitable in the sense that it is fit for human habitation.<sup>9</sup> Herewith are the cases that illustrate some indication of habitability, specifically in so far as the notion purports to mean a dwelling that is fit for human habitation in this context.

In the case of *Ex Parte De Douallier* (“*De Douallier*”),<sup>10</sup> property was left to the usufructuary.<sup>11</sup> The property was to later devolve on the usufructuary’s firstborn minor child. The will stipulated that the property was not to be mortgaged or alienated.<sup>12</sup> However, the usufructuary was extremely poor and the property had become uninhabitable. The usufructuary could not afford to make the repairs necessary to

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<sup>9</sup> Hall & Kellaway *Servitudes* 174; Muller et al *Silberberg and Schoeman’s The Law of Property* 386; Mostert et al *The Principles of the Law of Property in South Africa* 251; Corbett “Usufruct, *Usus* and *Habitatio*” in *The Law of Succession in South Africa* 376; *Ex Parte Davy* 1902 TH 96 97-98; *Ex Parte De Douallier* 1907 24 SC 282 283; cited in Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 82; *Ex Parte Atkins: In re Estate Lazarus* 1933 WLD 76 77; *Philps v Cradock Municipality* 1937 EDL 382 389; *Brunsdon’s Estate v Brunsdon’s Estate* 1920 CPD 159 174; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 7; *Nel v Potgieter* 1962 2 SA 608 (T) 610-611.

<sup>10</sup> *Ex Parte De Douallier* (1907) 24 SC 282.

<sup>11</sup> 283. The usufructuary was referred to in this matter as a petitioner.

<sup>12</sup> 283. See also Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 82, particularly footnote 288.

place the property in a habitable state of repair.<sup>13</sup> She then applied for leave to mortgage the property to raise money to pay for necessary repairs to the property. After having regard to the special circumstances *in casu*, the court granted the usufructuary the leave to mortgage the property for the means necessary to place the dwelling in a habitable state of repair.<sup>14</sup> Interestingly, the case shows how creative a court can be to ensure the right of a usufructuary to a habitable dwelling. The court's finding also indicates that a usufruct is fit for human habitation if that property is placed in a habitable state of repair.<sup>15</sup> This seems to imply that, at the very least, the dwelling in the context of a usufruct should be suitable to live in.<sup>16</sup> Property that is in a dilapidated condition or state of disrepair is not fit or suitable for human habitation.<sup>17</sup> Furthermore, the decision of the court in *De Douallier* signals that necessary repairs to the building classify as the standard that the usufructuary can expect.

The case of *De Douallier* was later followed in *Ex Parte Praetorius* ("Praetorius").<sup>18</sup> In *Praetorius*, a husband and wife were married in community of property.<sup>19</sup> They mutually bequeathed the usufruct of their estate to the surviving spouse, which in this case was the husband. However, the husband was too old and unable to look after himself out of the capital of the estate. Likewise, the husband could not pay for the rates or keep the property in good condition.<sup>20</sup> The court, referring to *De Douallier*, authorised the husband to mortgage the estate property to cover the costs already incurred in terms of rates and repairs.<sup>21</sup> The case of *Praetorius* endorses the idea that

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<sup>13</sup> *Ex Parte De Douallier* (1907) 24 SC 282 283. See also Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 82, particularly footnote 288.

<sup>14</sup> *Ex Parte De Douallier* (1907) 24 SC 282 283; followed with approval in *Ex Parte Praetorius* 1915 CPD 819 821; similarly in *Ex Parte Fourie* 1925 CPD 43 44. See further Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 82, particularly footnote 288; Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* 24-19.

<sup>15</sup> *Ex Parte De Douallier* 1907 24 SC 282 283.

<sup>16</sup> See chapter 2 above.

<sup>17</sup> *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 684.

<sup>18</sup> *Ex Parte Praetorius* 1915 CPD 819. See also Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 82.

<sup>19</sup> *Ex Parte Praetorius* 1915 CPD 820.

<sup>20</sup> 820.

<sup>21</sup> 821; cited in Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* 24-19; discussed in Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 82.

habitability of a usufruct dwelling means a residence that is kept in a good condition. Consequently, if the dwelling is not in good condition, the usufructuary, with the leave of the court, can be expected to effect repairs necessary to place the dwelling in a habitable state of repair. Again, as in *De Douallier* the repairs that were necessary to put the dwelling in a habitable state of repair point towards the standard that can be expected when the owner grants the usufructuary a usufruct. The court's decision in *Praetorius* is also laudable as it safeguards the usufructuary's right to have a habitable dwelling.

In another case of *Ex Parte Davy* ("Davy"),<sup>22</sup> H and W entered into an ante-nuptial contract.<sup>23</sup> In the contract, a certain property was vested in a trustee and a usufruct of that property granted to W. On W's death, the usufruct property was to devolve among the children born in the marriage of H and W. The usufruct property was in a dilapidated state and needed to be repaired.<sup>24</sup> The court in *Davy* allowed for money to be raised in order to pay for extraordinary repairs that were for the benefit of the property.<sup>25</sup> The case of *Davy* further shows that fit for human occupation includes making repairs that are necessary for the benefit of the property and not luxurious repairs.<sup>26</sup> Such necessary repairs in effect ensure the continued existence of the property.<sup>27</sup> In *Nel v Potgieter* ("Nel"),<sup>28</sup> the court also elaborated on the requirement of fit for human habitation. The court held that a house (including its accessories) that is subject to a usufruct must be delivered in a good condition so that the usufructuary can have the proper use of the house and its accessories, both of which are usually provided for the sake of comfortable living in the property.<sup>29</sup> The *Nel* case indicates that a usufruct dwelling is fit for human occupation if the property is delivered with everything that makes it more comfortable to live in.

Despite the lack of a clear definition of habitability in the case of usufructs, the statements in cases like *De Douallier*, *Praetorius*, *Davy* and *Nel* point toward an

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<sup>22</sup> *Ex Parte Davy* 1902 TH 96.

<sup>23</sup> 97.

<sup>24</sup> 97.

<sup>25</sup> 97-98.

<sup>26</sup> 97-98. See also recently the case of *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) *SAFLII* <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para 7.

<sup>27</sup> Muller et al *Silberberg and Schoeman's The Law of Property* 386.

<sup>28</sup> *Nel v Potgieter* 1962 2 SA 608 (T).

<sup>29</sup> 610-611.

outlining of the meaning of habitability as it can be derived from the requirement that the dwelling must be fit for human habitation. The following definition of habitability is proposed as derived from the above-mentioned judgments. Habitability in the sense of fit for human habitation means a dwelling that is placed in a habitable state of repair and allowed to be kept in a good condition for the duration of the usufruct. This, in turn, may imply allowing the usufructuary, with the leave of the court, to effect necessary (although not luxurious) repairs for the benefit of improving the property. Habitability in the sense of fit for human habitation further includes providing the usufructuary with all necessary accessories that would make living in the dwelling more comfortable or convenient. The statements such as “repairs done for the benefit of the property”,<sup>30</sup> “property kept in good condition”,<sup>31</sup> “placing the property in a habitable state of repair”<sup>32</sup> and that a “dwelling should include all that makes it more comfortable or convenient to live in”<sup>33</sup> when put together imply a very specific (an arguably individual) standard for usufructuaries based on pronouncements in the cases mentioned above dealing with usufruct. The reference to an arguably “individual” standard for usufructuaries illustrates that just as adequate housing generally means more than just mere habitability, each category may imply unique characteristics when one looks at the content of “adequate housing” for each category *beyond the minimum* standard of habitability.

#### 4 2 1 Concluding remarks

The meaning of habitability in the context of a usufruct is not clearly defined. Despite the lack of a definition, habitability in this context seems to mean that the usufruct property (or the property that is subject to the usufruct) is fit and habitable for human occupation.<sup>34</sup> The meaning of habitability as set out above does not indicate an explicit

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<sup>30</sup> *Ex Parte Davy* 1902 TH 96 97-98.

<sup>31</sup> *Ex Parte Praetorius* 1915 CPD 819 821.

<sup>32</sup> *Ex Parte De Douallier* 1907 24 SC 282 283.

<sup>33</sup> *Nel v Potgieter* 1962 2 SA 608 (T) 610-611.

<sup>34</sup> *Ex Parte Davy* 1902 TH 96 97-98; *Ex Parte De Douallier* (1907) 24 SC 282 283; *Ex Parte Atkins: In re Estate Lazarus* 1933 WLD 76 77; *Philps v Cradock Municipality* 1937 EDL 382 389; *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 174; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 7; *Nel v Potgieter* 1962 2 SA 608 (T) 610-611; Muller et al *Silberberg and Schoeman's The Law of Property* 386; Hall & Kellaway *Servitudes* 174.



standard of habitability. However, it does seem in terms of the common law that the standard of habitability is met when the dwelling is fit and habitable for human occupation.<sup>35</sup> Therefore, the usufruct property must be fit for occupation in order to satisfy the standard of habitability in the context of usufructuaries. It is important to note that an obligation in terms of habitability may nonetheless be informed specifically by a usufruct agreement and/or constitutional rights (or imperatives) as shown in 4.3 below, which is the next section that will be dealt with.

### **4.3 Impact of the Constitution on the standard of habitability for usufructuaries**

This section considers the impact of the Constitution on the common-law construct of a usufruct. More specifically, it is important to determine whether the Constitution (or constitutional rights more specifically) inform a standard of habitability in the context of a usufruct other than the specific standard outlined in the section above in terms of the common law. The appropriate point of departure for constitutional scrutiny is the principle of constitutional supremacy in terms of section 2 of the Constitution.<sup>36</sup> This section provides that the Constitution is the supreme law of the land and that all law or conduct that is not in line with the Constitution is invalid.<sup>37</sup> The section further provides that obligations that are imposed by the Constitution must be fulfilled.<sup>38</sup> Another important principle in constitutional analysis is the “single-system-of-law” principle that was stated in the case of *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* (“*Pharmaceutical Manufacturers*”).<sup>39</sup> In *Pharmaceutical Manufacturers*, the court held that there is only one system of law in the Republic. The Constitution as the supreme law shapes the

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<sup>35</sup> Hall & Kellaway *Servitudes* 174; Muller et al *Silberberg and Schoeman's The Law of Property* 386; *Ex Parte Davy* 1902 TH 96 97-98; *Ex Parte De Douallier* (1907) 24 SC 282 283; *Ex Parte Atkins: In re Estate Lazarus* 1933 WLD 76 77; *Philps v Cradock Municipality* 1937 EDL 382 389; *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 174; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 7; *Nel v Potgieter* 1962 2 SA 608 (T) 610-611.

<sup>36</sup> See chapter 2 above.

<sup>37</sup> See chapter 2 above.

<sup>38</sup> See chapter 2 above.

<sup>39</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC). See also Van der Walt *The Law of Servitudes* 38; ZT Boggenpoel *Property Remedies* (2017) 10.

system. The court further mentioned that all law, including the common law, derives its force from the Constitution and is subject to constitutional control.<sup>40</sup> In light of section 2 and the “single-system-of-law” principle, the common-law construct of a usufruct is part of a single system of South African law.<sup>41</sup> It is shaped by the Constitution as the supreme law, and it *should* derive its force from the Constitution. This would mean that a usufruct is subject to constitutional control and regulation.<sup>42</sup>

Considering the above framework, it is important to determine what source of law the usufructuary can use to find a remedy to protect his or her usufructuary interest. The sources of law that may generally apply are the Constitution and the common law.<sup>43</sup> The common law seems to be the obvious source of law in the context of usufructuaries. This can be argued based on the subsidiary principles.<sup>44</sup> For the purposes of a usufruct, the subsidiarity principles provide that where no legislation deals with the rights of a usufructuary, the common law should be directly relied upon.<sup>45</sup> This would mean that the matter will be decided purely on the basis of common law principles – unless these principles are not in line with the Constitution.<sup>46</sup> Once the relevant common-law position has been determined as set out above, the common law should be applied to the specific facts of the case at hand. What is important is to determine what the common-law position entails and what outcome is prescribed by the common law for the particular case.<sup>47</sup> At this stage, it is not necessary to question whether the outcome of the case is fair, or acceptable, or whether the common law should be developed, but primarily to set out what the position is in terms of the common law.<sup>48</sup>

In the context of the question of whether a usufruct dwelling is habitable, the assessment of the common law becomes relevant in the following case. The common

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<sup>40</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. See further Van der Walt *The Law of Servitudes* 38, especially footnote 97; Boggenpoel *Property Remedies* 10.

<sup>41</sup> Van der Walt *The Law of Servitudes* 39.

<sup>42</sup> 39.

<sup>43</sup> 39.

<sup>44</sup> 40.

<sup>45</sup> 40.

<sup>46</sup> 41.

<sup>47</sup> 41.

<sup>48</sup> 41.

law, indicates that the usufructuary must ask the court to lift the restraint on the testator's will, which stipulated that the property should not be mortgaged. The court will ordinarily assess the surrounding circumstances of the case to see whether the mortgage is in the best interest of the beneficiaries (that is, the usufructuary and the heir) of the bequest. If the mortgage beyond reasonable doubt benefits the beneficiaries, the court will normally lift the restrictive condition in the will so that the property can be mortgaged in order to raise money for necessary repairs. This shows how creative the courts have been to ensure that the dwelling of usufructuaries is in fact in a habitable state.

As the common-law position has been established, the next step is to determine whether the outcome prescribed by the common law is adequate, acceptable and justifiable in light of constitutional rights.<sup>49</sup> When a usufruct is granted against immovable property, it has the purpose of providing usufructuaries with personal residence and in effect protects their housing rights, security of tenure and provides human dignity in terms of the Constitution.<sup>50</sup> As such, the personal servitude of a usufruct is not immune to the Constitution, nor can it be excluded from constitutional scrutiny especially where the usufruct dwelling is not habitable.<sup>51</sup> If the dwelling that is subject to a usufruct is not habitable, it may constitute a contravention of rights

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<sup>49</sup> 41.

<sup>50</sup> AJ van der Walt "The Continued Relevance of Servitude" (2013) 3 *Property Law Review* 30; Van der Walt *The Law of Servitudes* 30 and 41; Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 305; Viljoen & Strydom "Tenure Security and the Reform of Servitude Law" in *Transformative Property Law: Festschrift in Honour of AJ van der Walt* (2018) 96-120.

<sup>51</sup> Van der Walt *The Law of Servitudes* 38; AJ van der Walt *Property and Constitution* (2012) 20-21; AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *South African Law Journal* 722 738; DM Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *South African Journal on Human Rights* 403 430; Van der Walt (2013) *Property Law Review* 31-32; Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 286; E Cameron *Justice: A Personal Account* (2014) 212; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 33; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 15; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) para 46; FI Michelman "The Rule of Law, Legality and the Supremacy of the Constitution" in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed Vol 1 (RS: 6 2014) 11-22 – 11-23 and 11-37 - 11-44.

enshrined in the Bill of Rights,<sup>52</sup> such as the right to human dignity,<sup>53</sup> security of tenure<sup>54</sup> or access to adequate housing.<sup>55</sup> Thus, the question is how the South African courts will, in future, deal with habitability in the context of usufructuaries given the constitutional right to human dignity, security of tenure and access to adequate housing, which arguably also applies to usufructuaries. In other words, it is important to consider whether a usufructuary will be able to rely on the Constitution, more specifically the right to human dignity, security of tenure or access to adequate housing, to argue that a usufruct dwelling is not habitable. Arguably, it needs to be established whether the common-law requirements of “fit for occupation” or “use and enjoyment” – as developed in case law dealing with usufructuaries – are sufficient to provide a usufructuary with a minimum standard to ensure that the usufructuary dwelling is in fact habitable. The aim is to highlight these links so that clarity can be established concerning the impact of the Constitution on the common-law construct of the usufruct, especially in so far as it pertains to a potential minimum standard of habitability for usufructuaries.

The starting point to investigate the implication of the Constitution on the outcome that is prescribed by the current position of the common law is to determine whether the common law is in conflict with constitutional rights such as human dignity, and the others.<sup>56</sup> The common-law position is illustrated by the cases of *De Douallier* and *Praetorius* discussed earlier in this chapter. Although the cases of *De Douallier* and *Praetorius* were decided solely on common law principles and essentially prescribe the ambit of the common-law position regarding habitability in the context of usufructs, the cases essentially show how imaginative courts can be to protect constitutional rights and do not pertinently indicate any visible infringement of constitutional rights. This is because the court permitted the restriction to mortgage in the will and allowed

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<sup>52</sup> Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 8 and 305.

<sup>53</sup> Section 10 of the Constitution. It provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”

<sup>54</sup> Section 25(6) of the Constitution which states that “[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

<sup>55</sup> Section 26(1) of the Constitution. This section makes provision that “[e]veryone has the right to have access to adequate housing.”

<sup>56</sup> Van der Walt *The Law of Servitudes* 41-42.

the usufructuary to mortgage the dwelling to effect necessary repairs aimed at placing the property in a habitable condition. However, if the outcome of the common-law position was that a court cannot lift conditions in a will, the rigid application of the common law in that regard would arguably have resulted in usufructuaries being denied their right to live in a habitable dwelling that protects their human dignity, security of tenure or access to adequate housing. In my view, such an outcome would directly impact on constitutional rights such as human dignity or access to adequate housing. In such instances, the usufructuary should arguably be able to rely on constitutional rights to argue that the usufruct is not habitable or that the development of the common law should be considered.<sup>57</sup> This is because such a rigid application of the common law would arguably be in direct conflict with constitutional provisions.<sup>58</sup> Nevertheless, as highlighted already, the manner in which the cases of *De Douallier* and *Praetorius* were decided ensured that a usufructuary dwells in adequate housing that is habitable and accords with human dignity. In this regard, a need has not arisen to develop the common law and the common law as applied currently is arguably unproblematic.<sup>59</sup>

Given that the common law remains intact, a further interesting question that arises is whether the common-law requirements of “fit for occupation” or “use and enjoyment”, which were developed by the courts, are adequate to provide a usufructuary with a minimum standard that ensures that the usufructuary lives in a habitable dwelling. I would argue that the common-law *fit for occupation* requirement or the entitlement of *use and enjoyment* are sufficient to provide usufructuaries with a minimum standard of habitability in the case of the dwelling being uninhabitable. As a point of departure, a usufruct dwelling should be fit for human occupation.<sup>60</sup> The principle is that a usufructuary is entitled to the use of the usufruct.<sup>61</sup> The usufructuary cannot enjoy that use or even draw appropriate benefits from the usufruct unless it is fit for occupation. Consequently, the common law as it stands is likely to be sufficient to protect the interests of usufructuaries.

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<sup>57</sup> 43-44.

<sup>58</sup> 44.

<sup>59</sup> 42.

<sup>60</sup> See part 4 2 above.

<sup>61</sup> See parts 4 2 above and 4 4 below.

The way the court in *De Douallier* and *Praetorius* applied the common law in a flexible manner indirectly upheld constitutional rights due to the court's willingness to safeguard the interests of the usufructuaries.<sup>62</sup> Furthermore, the decisions of the court in *De Douallier* and *Praetorius* inherently indicate that the common-law construct of a usufruct is in fact part of a "single-system-of-law" which is shaped by the Constitution as the supreme law of the land.<sup>63</sup> As such, the common-law construct of a usufruct derives its force from the Constitution and it is not immune to constitutional control and regulation.<sup>64</sup> As a result, the common-law construct of a usufruct does in effect

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<sup>62</sup> Section 2 of the Constitution. On the issue of constitutional supremacy, see Van der Walt *The Law of Servitudes* 38; Van der Walt *Property and Constitution* 19, particularly footnote 1; Van der Walt (2013) *South African Law Journal* 738; Van der Walt (2013) *Property Law Review* 31; I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 9; LR Ngwenyama *The Impact of Section 34 of the Constitution of the Republic of South Africa, 1996 on Banking Law* LLM dissertation, University of Johannesburg (2016) 8; Cameron *Justice: A Personal Account* 177 and 212; A Devenish *A Commentary on the South African Bill of Rights* (1999) 10; DE van Loggerenberg "Excerpts from the Constitution of the Republic of South Africa, 1996" in DE van Loggerenberg & E Bertelsmann (eds) *Erasmus: Superior Court Practice* 2 ed Vol 1 (OS: 6 2015) A1-2; Michelman "The Rule of Law, Legality and the Supremacy of the Constitution" in CLOSA 11-34 – 11-44; cited in Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 286; *Carmichele v Minister of Safety & Security* 2001 4 SA 938 (CC) para 33.

<sup>63</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) paras 44 and 49. See further Van der Walt *The Law of Servitudes* 38-39; Van der Walt *Property and Constitution* 20; Michelman "The Rule of Law, Legality and the Supremacy of the Constitution" in CLOSA 11-22 – 11-23 and 11-37 - 11-44; Davis & Klare (2010) *South African Journal on Human Rights* 403 430.

<sup>64</sup> Van der Walt *The Law of Servitudes* 38-39; Van der Walt *Property and Constitution* 20; Van der Walt (2013) *South African Law Journal* 738; Van der Walt (2013) *Property Law Review* 31-32; AJ van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *Constitutional Court Review* 77 77-128; AJ van der Walt "The Modest Systemic Status of Property Rights" (2014) 1 *Journal for Law, Property and Society* 15 15-106; Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 286; Michelman "The Rule of Law, Legality and the Supremacy of the Constitution" in CLOSA 11-22 – 11-23 and 11-37 - 11-44; ZT Boggenpoel "Does Method Really Matter? Reconsidering the Role of Common Law Remedies in the Eviction Paradigm" (2014) 25 *Stellenbosch Law Review* 72 72-98; ZT Boggenpoel "(Re)defining the Contours of Ownership: Moving Beyond White Picket Fences" (2019) 30 *Stellenbosch Law Review* 234 240, particularly footnote 41; G Muller "Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa" (2015) 132 *South African Law Journal* 616 637; Davis & Klare (2010) *South African Journal on Human Rights* 403 430, the authors say that the common law must be interpreted and assessed within



promote the spirit, purport and objects of the Bill of Rights in terms of the Constitution.<sup>65</sup> It is important to state that when the Constitution was put into effect it was intended that the law, including the common law, should reflect the recognised normative value-based system as found in the Constitution.<sup>66</sup> This is because the Constitution imposes new obligations on the owner concerning property rights, which

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the scope and lens of the Constitution, citing *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* No 2001 1 SA 545 (CC) para 21 and *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2006 1 SA 144 (CC) paras 44 and 51; *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 31; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) paras 44 and 49; In *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 15, the court mentioned that all law and the common law is subject to constitutional control; *Carmichele v Minister of Safety & Security* 2001 4 SA 938 (CC) para 33; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) para 46.

<sup>65</sup> Section 39(2) of the Constitution. See further Van der Walt *Property and Constitution* 20-21; Muller (2018) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 533; Cameron *Justice: A Personal Account* 184; DM Davis "How many Positivist Legal Philosophers can be made to Dance on the Head of a Pin? A Reply to Professor Fagan" (2012) 129 *South African Law Journal* 59 66; Davis & Klare (2010) *South African Journal on Human Rights* 403 425-428; A Fagan "The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development" (2010) 127 *South African Law Journal* 611 611-627; S Woolman "The Amazing, Vanishing Bill of Rights" (2007) 124 *South African Law Journal* 762 768-782; AJ van der Walt "Transformative Constitutionalism and the Development of South African Property Law (Part 1)" (2005) *Tydskrif vir die Suid-Afrikaanse Reg* 655 655-689; AJ van der Walt Transformative Constitutionalism and the Development of South African Property Law (Part 2) (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 1 1-31; AJ van der Walt "Developing the Law on Unlawful Squatting and Spoliation" (2008) 125 *South African Law Journal* 24 34; D Cornell & N Friedman "In defence of the Constitutional Court: Human Rights and the South African Common Law" (2011) 5 *Malawi Law Journal* 1 18; Viljoen & Strydom "Tenure Security and the Reform of Servitude Law" in *Transformative Property Law: Festschrift in Honour of AJ van der Walt* (2018) 97; *Masiya v Director of Public Prosecutions* 2007 5 SA 30 (CC) para 45; *Carmichele v Minister of Safety & Security* 2001 4 SA 938 (CC) para 33.

<sup>66</sup> Davis (2012) *South African Law Journal* 59; Woolman (2007) *South African Law Journal* 769; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 49; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54; *K v Minister of Safety & Security* 2005 6 SA 419 (CC) paras 16-17; *S v Thebus* 2003 6 SA 505 (CC) para 27-28.

the common law did not recognise as valid.<sup>67</sup> It follows from this that the owner (or heirs) cannot simply say that the usufruct property is his, and he can repair it when he wants to.<sup>68</sup> The reason for this is that the moment the usufruct is constituted, the owner (or the heirs) are under the obligation to allow the usufructuary in property that is fit for occupation to exercise his or her rights pertaining to the usufruct property.<sup>69</sup> In this regard, the owner (or the heirs) may be required to effect structural repairs, which are reasonably necessary to bring the usufruct property in a habitable state of repair.<sup>70</sup>

#### 4 3 1 Concluding remarks

Literature and case law indicate that usufructuaries do not rely on their constitutional rights such as access to adequate housing, human dignity and security of tenure to ensure that their dwelling is brought in line with a standard of habitability.<sup>71</sup> There is also currently no applicable legislation to regulate this part of the law. The common law will therefore have to be relied upon by usufructuaries as the applicable source of law as a point of departure.<sup>72</sup> This would mean that the common-law position and outcome prescribed by the common law will have to be followed in the specific case.<sup>73</sup> If the outcome prescribed by the common law is inadequate or unacceptable or unjustifiable given the implication of constitutional rights, the development of the common law will have to be considered by the court in view of relevant constitutional rights.<sup>74</sup> Thus, apart from the courts developing a normative framework for decisions,

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<sup>67</sup> Compare *Daniels v Scribante* 2017 4 SA 341 (CC) paras 49 and 135. See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23; referred to in *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 28; Van der Walt *Property and Constitution* 22; Van der Walt *The Law of Servitudes* 45; ZT Boggenpoel "Property" (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Boggenpoel (2019) *Stellenbosch Law Review* 234 238.

<sup>68</sup> See, for example, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 20. Compare *Daniels v Scribante* 2017 4 SA 341 (CC) paras 133-142. See also Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1.

<sup>69</sup> Mostert et al *The Principles of the Law of Property in South Africa* 251.

<sup>70</sup> 251.

<sup>71</sup> See Steyn *The Law of Wills in South Africa* 389; Hall & Kellaway *Servitudes* 175; *Ex Parte De Douallier* 1907 24 SC 282; *Ex Parte Praetorius* 1915 CPD 819 821.

<sup>72</sup> Van der Walt *The Law of Servitudes* 43.

<sup>73</sup> 41.

<sup>74</sup> 41-44.

the courts should always take into consideration the implication of the Constitution on the standard of habitability for usufructuaries, as shown in *Douallier* and *Praetorius*. Nevertheless, it was argued that an obligation in terms of habitability may not be informed directly by constitutional rights as shown in 4 3 above, but constitutional rights must still be given effect to by the common law. It remains to be seen whether an obligation to ensure habitability in fact rests on the owner of usufruct dwelling as will be questioned in 4 4 below.

#### **4 4 On whom does the obligation rest to ensure habitability in the context of usufructuaries?**

The purpose of this section is to examine whether the obligation to ensure habitability rests on the owner or the usufructuary. As previously mentioned, a usufruct ordinarily comes with the entitlement of use and enjoyment of the dwelling for the benefit of usufructuaries.<sup>75</sup> In view of that, the usufruct property will arguably only be useful and

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<sup>75</sup> Van der Walt *The Law of Servitudes* 464 and 472; Corbett "Usufruct, *Usus* and *Habitatio*" in *The Law of Succession in South Africa* 366 and 373; Hall & Kellaway *Servitudes* 166-167; Muller et al *Silberberg and Schoeman's The Law of Property* 383-384; Van der Merwe "Case 1: Various Instances of Time-Limited Interests" in *The Common Core of European Private Law Time Limited Interests in Land* 125; Mostert et al *The Principles of the Law of Property in South Africa* 248-250; Van der Merwe & De Waal *The Law of Things & Servitudes* 210 and 212; Van der Merwe, De Waal & Carey Miller *International Encyclopaedia of Laws* 442 and 444; Van der Merwe & Pope "Servitudes and Other Real Rights" 604 and 606; Van der Merwe & De Waal "Servitudes" in *The Law of South Africa* paras 581 and 585; Gordon & De Waal "Servitudes and Real Burdens" in *Mixed Legal Systems in Comparative Perspective Property and Obligations in Scotland and South Africa* 755; De Waal "Servitudes" in *Southern Cross: Civil Law and Common Law in South Africa* 810-811; Sharrock *Business Transactions Law* 892; Steyn *The Law of Wills in South Africa* 380; Lee *An Introduction to Roman-Dutch Law* 181; Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* 24-1 and 24-17; Apers & Verbeke (2014) *Tydskrif vir die Suid-Afrikaanse Reg* 117; Muller (2018) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 529 529; *De Smidt v Burton, Master of the Supreme Court* (1828-1849) 1 Menz 222 228; *Furnivall v Cornwell's Executors* (1895) 12 SC 6 10; *Master v African Mines Corporation Ltd* 1907 TS 925 927; *Day's Trustees v Registrar of Deeds* 1910 CPD 361 367; *Fourie v Munnik* 1919 OPD 73 79; *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 174; *Morkel v Malan* 1933 CPD 370 374-375; *Barnett v Rudman* 1934 AD 203 206 and 211; *In re Cooper's Estate* 1939 CPD 309 311; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 8; *Cowley v Hahn* 1987 1 SA 440 (E) 446.

enjoyable to the usufructuaries if it is habitable.<sup>76</sup> This implies a very particular standard of habitability for usufructuaries. Therefore, in this context, the owner (or heir) is obliged to ensure that the dwelling is in a liveable or habitable condition during the continuation of the usufruct.<sup>77</sup> This is because the maintenance of special or extraordinary repairs of the dwelling to keep it fit for human habitation are on the owner's account.<sup>78</sup> The owner is responsible for the permanent maintenance of the

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<sup>76</sup> *Ex Parte De Douallier* (1907) 24 SC 282 283. Followed in *Ex Parte Praetorius* 1915 CPD 819 821. Compare *Daniels v Scribante* 2017 4 SA 341 (CC) para 32.

<sup>77</sup> Hall & Kellaway *Servitudes* 174. Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* 24-19. Mostert et al *The Principles of the Law of Property in South Africa* 251, the authors point out that once the usufruct comes into existence, the owner is under the obligation to allow the usufructuaries to exercise their entitlements or rights. This means that necessary repairs to keep the usufruct dwelling habitable may have to be borne by the owner. Muller et al *Silberberg and Schoeman's The Law of Property* 386. Van der Merwe & De Waal *The Law of Things & Servitudes* (1993) 215. Corbett "Usufruct, *Usus* and *Habitatio*" in *The Law of Succession in South Africa* 373. Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 82. *Ex Parte Praetorius* 1915 CPD 819 821. *Ex Parte De Douallier* (1907) 24 SC 282 283. *Nel v Potgieter* 1962 2 SA 608 (T) 610-611. *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 686-687. In *Brett v Barclays Bank (D C & O)* 1954 1 SA 260 (N) 263, the court found that a bequest stating that the usufructuary is entitled to the "free use and enjoyment of the usufruct" should mean that the testator's intention was that the capital of the estate was to cover the heavy costs of putting the property in repair. Compare *Crosbie v Crosbie's Executor* (1904) 21 SC 597 606, where the court held that the obligation to ensure that a house is maintained in a habitable condition and not to allow that house to fall into a state of disrepair as to render it uninhabitable rests on the testator's estate.

<sup>78</sup> Hall & Kellaway *Servitudes* 170 and 174, the authors point out that if the usufruct property has fallen into a state of disrepair by reason of no fault attributable to the usufructuary and the property can be regarded as reasonably unusable or uninhabitable, the owner or the main part of his estate is liable to cover the expenses of repair. Van der Merwe "Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew" in *The Common Core of European Private Law Time Limited Interests in Land* 266. Muller et al *Silberberg and Schoeman's The Law of Property* 386. Mostert et al *The Principles of the Law of Property in South Africa* 250. Van der Walt *The Law of Servitudes* 478-479. Corbett "Usufruct, *Usus* and *Habitatio*" in *The Law of Succession in South Africa* 376-377. Van der Merwe & De Waal *The Law of Things & Servitudes* 215. Van der Merwe, De Waal & Carey Miller *International Encyclopaedia of Laws* 449. Van der Merwe & De Waal "Servitudes" in *The Law of South Africa* para 595. Van der Merwe & Pope "Servitudes and Other Real Rights" in *Willie's Principles of South African Law* 609, citing *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR). Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* 24-19, the author mentions that the usufructuaries are not under the obligation to

usufruct dwelling as permanent maintenance relating to the habitability of the property is arguably not done regularly.<sup>79</sup> For example, if a storm causes damage to the roof of the usufruct dwelling to the effect that it becomes impossible to live in the property, it is the owner who must repair the roof. Likewise, if the usufruct dwelling becomes seriously dilapidated with age or on account of weather or termites, the owner is obliged to make the required repairs. The reason for this is that the maintenance of the roof or the buildings is permanent in nature and therefore should be borne by the owner.<sup>80</sup>

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make improvements or repairs that are necessary where the usufruct buildings have become uninhabitable due to age. This also applies where the damage caused on the buildings is by accident and not attributable to the usufructuaries, or it is by action of heavy weather conditions. In effect, what the author says is that the usufructuaries cannot replace anything of the usufruct premises that has by reasonable wear and tear has worn out. Muller (2018) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 538, states that the owner is to bear all the costs of extraordinary improvements to ensure the continued existence of the property. *Executors of Meyer v Meyer* (1880-1882) 1 SC 377 378. *Ex Parte Davy* 1902 TH 96 97-98. *Ex Parte Becker* (1908) 25 SC 418 419. In *Schoon's Trustee v Schoon's Executors* 1915 CPD 786 788, the usufructuary's claim for useful expenses after having effected necessary repairs to preserve the usufruct property in a condition that is fit for human habitation was allowed to recover useful expenses to the extent to which the property was enhanced in value. *Ex Parte Praetorius* 1915 CPD 819 821. In *Gibaud v Bagshaw* 1918 CPD 202 205, the court opined that usufructuaries are not obliged to replace any property of the usufruct which has by good faith been diminished, or destroyed, or worn out. In support of this is the case of *Furnivall v Cornwell's Executors* (1895) 12 SC 6 10. *Master v African Mines Corporation Ltd* 1907 TS 925 929. *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 174-175. *Wait v Estate Wait* 1930 CPD 1 4. In *Gordon's Bay Estates v Smuts* 1923 AD 160 166, the court mentioned that a testatrix as an owner of a farm knows that the owner of property pays bills for the rates, repairs and taxes levied on the property. *Ex Parte Atkins: In re Estate Lazarus* 1933 WLD 76 78. *Philps v Cradock Municipality* 1937 EDL 382 389. *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 686-687. *Brett v Barclays Bank (D C & O)* 1954 1 SA 260 (N) 263. *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para 2. Compare *Crosbie v Crosbie's Executor* (1904) 21 SC 597 606.

<sup>79</sup> Van der Merwe "Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew" in *The Common Core of European Private Law Time Limited Interests in Land* 266; *Philps v Cradock Municipality* 1937 EDL 382 389.

<sup>80</sup> Van der Merwe "Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew" in *The Common Core of European Private Law Time Limited Interests in Land* 266; Van der Walt *The Law of Servitudes* 478; Mostert et al *The Principles of the Law of Property in South Africa* 250; Hall & Kellaway *Servitudes* 170 and 174, the authors say that



The case of *Ex Parte Estate Borland* (“*Borland*”)<sup>81</sup> is relevant in this regard. In this case, one of the usufruct farm dwellings of the testator was in a seriously dilapidated condition when the testator died.<sup>82</sup> The farm dwelling was old due to age and it was subjected to the plundering of termites. Thus, if reasonable steps were not taken to make necessary repairs on the farm dwelling it would undoubtedly have fallen into a state of disrepair and would have been rendered useless and unfit for human habitation.<sup>83</sup> Accordingly, the testator’s wife expended excess sums of money to effect necessary renovations, repairs and improvements. The wife, as one of the estate administrators, and other administrators approached the court to seek authority empowering them as administrators to reimburse her for the amount of money she used to preserve the dwelling in good condition and to protect it from collapsing.<sup>84</sup>

In *Borland*, the court applied the case of *Brunsdon’s Estate v Brunsdon’s Estate* (“*Brunsdon*”)<sup>85</sup> and reiterated the general principle that usufructuaries are *not* entitled to claim reimbursement for improvements.<sup>86</sup> This is because one of the obligations of a usufructuary is to keep the usufruct dwelling in a state of good repair and to meet all ordinary expenses at his or her own costs. However, the court held that it was only when the expenses incurred in putting the usufruct property in a state of good repair are special or extraordinary that the owner will have to reimburse the usufructuary for expenses incurred.<sup>87</sup> Based on the evidence before the court, it seemed clear that the dwelling was dilapidated because it was old. As such, the court held that the preservation or protection of the dwelling in good condition by the usufructuary

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heavy expenses of an unusual kind aimed to prevent flood and damage caused by floods can be recovered from the owner; *Philips v Cradock Municipality* 1937 EDL 382 389.

<sup>81</sup> *Ex Parte Estate Borland* 1961 1 SA 6 (SR).

<sup>82</sup> 7.

<sup>83</sup> 7. See also Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 84.

<sup>84</sup> *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 7.

<sup>85</sup> *Brunsdon’s Estate v Brunsdon’s Estate* 1920 CPD 159.

<sup>86</sup> *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 8, citing *Brunsdon’s Estate v Brunsdon’s Estate* 1920 CPD 159 174-175. See further Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 84-85; Van der Walt *The Law of Servitudes* 479; Muller (2018) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 539, particularly footnote 96.

<sup>87</sup> *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 8, quoting *Brunsdon’s Estate v Brunsdon’s Estate* 1920 CPD 159 174-175 and 178-179. See further Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 84-85; Van der Walt *The Law of Servitudes* 479; Muller (2018) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 529 539, particularly footnote 96.



amounted to extraordinary repairs. As the testator's wife had actually made the required repairs, the court was satisfied that she was entitled to compensation from the owner or his estate in the amount claimed.<sup>88</sup> The relevance of this case is that it indicates that the owner (or his capital estate) is responsible for repairs that are necessary to ensure that the dwelling is in a condition that is fit for human habitation in the context of usufructuaries. This is because the costs of necessary repairs to preserve a dwelling in a condition that is fit for human habitation or to protect the dwelling from being declared unfit for human habitation are so special or extraordinary in nature that they should be met by the owner or paid from his or her capital estate.<sup>89</sup>

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<sup>88</sup> *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 9-10. See further *Ex Parte Atkins: In re Estate Lazarus* 1933 WLD 76 78; *Brunsdon's Estate v Brunsdon's Estate* 1920 CPD 159 174; *Philps v Cradock Municipality* 1937 EDL 382 389; in *Stamper v Estate Stamper* 1910 CPD 442 450, the court found that where the usufructuary had paid out debts for the benefit of the estate, he is entitled to reclaim the amount of such payments out of the assets in the estate; *Schoon's Trustee v Schoon's Executors* 1915 CPD 786 788; Van der Merwe "Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew" in *The Common Core of European Private Law Time Limited Interests in Land* 266, he mentions that when the usufructuaries have made repairs, they are entitled to claim compensation from the owner; similar point highlighted in Hall & Kellaway *Servitudes* 170 and 174; as well as in Van der Merwe & Pope "Servitudes and Other Real Rights" in *Willie's Principles of South African Law* 591 609-610; the same statement is stated in Van der Merwe & De Waal "Servitudes" in *The Law of South Africa* paras 596 and 598; similarly in Van der Merwe, De Waal & Carey Miller *International Encyclopaedia of Laws* 449 and 450; too Van der Merwe & De Waal *The Law of Things & Servitudes* 216; same in Muller et al *Silberberg and Schoeman's The Law of Property* 386; similar point in Mostert et al *The Principles of the Law of Property in South Africa* 251; alike in Corbett "Usufruct, *Usus* and *Habitatio*" in *The Law of Succession in South Africa* 377; Van der Walt *The Law of Servitudes* 479; Muller (2018) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 539, particularly footnote 96; Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 84.

<sup>89</sup> Hall & Kellaway *Servitudes* 170 and 174; Lee *An Introduction to Roman-Dutch Law* 183; Van der Merwe "Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew" in *The Common Core of European Private Law Time Limited Interests in Land* 266; Van der Merwe & De Waal *The Law of Things & Servitudes* 215; Van der Merwe, De Waal & Carey Miller *International Encyclopaedia of Laws* 449; Van der Merwe & De Waal "Servitudes" in *The Law of South Africa* para 595; Van der Merwe & Pope "Servitudes and Other Real Rights" in *Willie's Principles of South African Law* 609; Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* 24-19; Van der Walt *The Law of Servitudes* 478-479; Corbett "Usufruct, *Usus* and *Habitatio*" in *The Law of Succession in South Africa* 376-377; Muller et al *Silberberg and Schoeman's The Law of Property* 386; Mostert et al *The Principles of the Law of Property in South Africa* 251; *Brunsdon's Estate v Brunsdon's Estate*

In this regard, it should be noted that the option of the usufructuary effecting preservation repairs and then claiming them back from the owner later is not always available to all usufructuaries especially those who are poor.<sup>90</sup>

In another case of *Ex Parte Standard Bank Ltd: in re Estate Rodger* ("Rodger"),<sup>91</sup> the testatrix bequeathed certain farms to her husband. When the husband died, the farms were left to the son. After the son's death, the farms devolved to the grandson.<sup>92</sup> In terms of the will, the beneficiaries had to lease other premises on the farms so that they could have money to cover living expenses.<sup>93</sup> On one of the farms, there was a dwelling in a seriously dilapidated condition and to continue to rent the premises in a reasonable condition to tenants, it was necessary to have the dwelling repaired and renovated. In this case, the bank was the administrator of the testatrix's estate and it obtained an estimated amount for the cost of the necessary work that had to be done. The bank sought authority to use the capital money of the estate to cover the estimated costs for the repairs.<sup>94</sup> In light of the facts of the case of *Rodger*, the court authorised the administrator to effect the required repairs using the capital of the estate.<sup>95</sup> This case confirms that if the usufruct dwelling has become dilapidated due to reasonable use, the lapse of time, or damage occasioned by an act of God or excessive weather conditions, it is the owner of the property that is essentially responsible to ensure the dwelling is fixed to make it habitable. Van der Walt properly holds the view that unusual expenses which are necessary for long-term maintenance of the usufruct dwelling like ensuring the prevention of erosion or flooding on the dwelling are the responsibility of

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1920 CPD 159 172-178; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 9; *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 686.

<sup>90</sup> Compare generally with tenants: *Mpange v Sithole* 2007 6 SA 578 (W) para 55; G Glover *Kerr's Law of Sale and Lease* 4 ed (2014) 396; G Bradfield & K Lehmann *Principles of the Law of Sale & Lease* 3 ed (2013) 146; S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 365.

<sup>91</sup> *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR).

<sup>92</sup> 684.

<sup>93</sup> 684.

<sup>94</sup> 684.

<sup>95</sup> 686-687. See also *Ex Parte Atkins: In Re Estate Lazarus* 1933 WLD 76 77-78. In this case, the court held that the usufructuary was not liable for structural alterations and repairs as alterations or repairs amount to capital expenditure. See further Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 83.

the owner.<sup>96</sup> Corbett similarly submits that the owner is bound to repair anything in the usufruct dwelling which has become dilapidated with time and to reinstate it as it calls for heavy expenditure.<sup>97</sup> Likewise, Van der Merwe states that the owner is to handle the permanent maintenance of the dwelling.<sup>98</sup> Hall and EA Kellaway also correctly mention that the owner should repair what has become reasonably useless or not habitable.<sup>99</sup>

The above discussion clearly shows the default principles, which are compulsory whenever a usufruct is granted by the owner.<sup>100</sup> The case of *Lola v Rimon* (“*Lola*”),<sup>101</sup> shows that the default principle as to the maintenance of the usufruct dwelling can be transferred by a deed of usufruct between the parties to the owner.<sup>102</sup> In *Lola*, L and R entered into a notarial deed of usufruct.<sup>103</sup> Among other terms of the deed of usufruct, R was to maintain the property. This means that L was released from the common-law duty to effect ordinary repairs on the property. In this case, by implication, the duty to maintain the dwelling was on the owner, R, in terms of the agreement.<sup>104</sup>

At one point in time, L requested R to undertake the repainting on the property. However, R refused to repaint the property because it was seemingly in good condition. Furthermore, repainting the property amounted to a luxurious expense. As previously mentioned, fit for human occupation includes necessary repairs but not luxurious repairs. In this regard, R asserted that his obligation to maintain the property

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<sup>96</sup> Van der Walt *The Law of Servitudes* 478.

<sup>97</sup> Corbett “Usufruct, *Usus* and *Habitatio*” in *The Law of Succession in South Africa* 376.

<sup>98</sup> Van der Merwe “Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew” in *The Common Core of European Private Law Time Limited Interests in Land* 266.

<sup>99</sup> Hall & Kellaway *Servitudes* 170.

<sup>100</sup> It should be mentioned that where the usufruct is created in terms of an agreement between living partners, the partners may opt to waive the default principles. However, where constitutional rights are implicated the partners cannot waive constitutional principles. See generally Van der Merwe “Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew” in *The Common Core of European Private Law Time Limited Interests in Land* 266.

<sup>101</sup> *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>>.

<sup>102</sup> Para 2. See also Van der Walt *The Law of Servitudes* 480.

<sup>103</sup> *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para 6.

<sup>104</sup> Paras 2 and 5.

was triggered when there was a need to effect reasonably necessary repairs to keep the property in good condition.<sup>105</sup>

The crux of the matter concerned the alleged breach by R in failing to repaint the property.<sup>106</sup> The court illustrated the meaning of the requirement *to maintain* a dwelling, as noted in a notarial deed of the usufruct.<sup>107</sup> The word “maintain” from the Merriam-Webster dictionary means to keep the property in an existing state of repair, efficient or valid, or to preserve the property from failure or decline.<sup>108</sup> The court further noted that the word “maintain” from the Blacks Dictionary implies care for property, or involvement in the general repair and upkeep of the property.<sup>109</sup> Finally, the court concluded that where the obligation to maintain the dwelling is not expanded on in the agreement itself, the dictionary and ordinary meaning of the word “maintain” will prevail.<sup>110</sup> The duty to maintain is limited to keeping the property in the condition it was in at the time of signing the agreement and would exclude liability for other luxurious improvements.<sup>111</sup>

In the end, it was concluded that L (as the usufructuary) failed to make out a case that R (as the owner) had neglected to maintain the property, by not repainting it, in the condition it was in at the time when the deed of usufruct was concluded.<sup>112</sup> As such, R’s failure to repaint the property did not amount to a breach of his obligation in terms of the deed of usufruct.<sup>113</sup> The court held that the onus was on L as the usufructuary to prove on a balance of probabilities that R as the owner was obliged to put the property in the same condition it was in when the deed of usufruct was entered into.<sup>114</sup> Consequently, L did not discharge the onus to show that R indeed was in

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<sup>105</sup> Para 7.

<sup>106</sup> Para 17.

<sup>107</sup> Para 17.

<sup>108</sup> Para 17. See also Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 5.

<sup>109</sup> *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para 17. See also Grobler *The Salva Rei Substantia Requirement in Personal Servitudes* 5.

<sup>110</sup> *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para 17.

<sup>111</sup> Para 18.

<sup>112</sup> Para 19.

<sup>113</sup> Paras 19 And 29.

<sup>114</sup> Para 19. See also Van der Walt *The Law of Servitudes* 480.

breach of the provisions of the deed of usufruct in relation to maintenance. The court could therefore not specifically compel R to perform under the agreement.<sup>115</sup>

The judgment of *Lola* proves that a usufructuary is the one who must show why an owner is obliged to make repairs to the property in order to comply with his obligation to maintain under the agreement.<sup>116</sup> For example, if the painting of the property flakes off, the usufructuary must show that the property has deteriorated to the extent that the owner is obliged to paint the property to comply with his obligation to maintain the property in a good state of repair.<sup>117</sup> By implication of the common law principles, if the paint flakes off and it involves major expenses the owner will have to cover the cost of the repair.<sup>118</sup>

#### 4 4 1 Concluding remarks

In light of the principles discussed above, this part of chapter 4 concludes that the duty to ensure that the dwelling is in a state of good repair falls on the landowner (or heir). The owner (or the heir) is to ensure that the dwelling of the usufruct is maintained for

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<sup>115</sup> *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras 30-31.

<sup>116</sup> Van der Walt *The Law of Servitudes* 480; *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras 19 and 30-31.

<sup>117</sup> *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras 19 and 30, the usufructuary must describe the area to be repainted, for instance only one wall or one or two rooms. The usufructuary must also give a detailed description of the area affected by moisture.

<sup>118</sup> See specifically Van der Merwe “Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew” in *The Common Core of European Private Law Time Limited Interests in Land* 266. See further Hall & Kellaway *Servitudes* 170 and 174; Van der Walt *The Law of Servitudes* 479; Corbett “Usufruct, *Usus* and *Habitatio*” in *The Law of Succession in South Africa* 376-377; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 9-10; *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 686; *Philps v Cradock Municipality* 1937 EDL 382 389, where the court mentioned that where the usufructuary had effected a useful improvement by rebuilding what has fallen into ruin and the repair has become an exceptional expense, the usufructuary is entitled to recover from the owner; *Ex Parte Atkins: In re Estate Lazarus* 1933 WLD 76 78, where a certain building needed to be structurally altered and repaired for it to continue to be practically useful, the court found that the structural alterations and repairs were capital expenses not to be borne by the usufructuary but the use of capital estate to improve the building; *Brunsdon’s Estate v Brunsdon’s Estate* 1920 CPD 159 174.

the period of the usufruct.<sup>119</sup> In this regard, the owner (or the heir) is bound to cover all extraordinary repairs reasonably necessary to keep the dwelling in a repaired condition and as such repairs that are permanent in nature are to be borne by the owner or the heir.<sup>120</sup> These are default principles that are mandatory in all instances unless the usufruct is established by way of an agreement between living partners as shown in the *Lola* judgment as outlined above.<sup>121</sup>

A usufruct created in terms of an agreement has the potential implication of absolving the usufructuary from any common-law obligations under the usufruct.<sup>122</sup> However, if a dispute does arise calling upon the owner to maintain the property and he does not do so, the onus is on the usufructuary to advance arguments to the court as to why the owner should be specifically compelled by the court to maintain the dwelling as required by that agreement.<sup>123</sup> The definition of “maintain” in the context of usufructuaries was clearly set out in the case of *Lola* to mean keeping the property in an existing state of repair to prevent it from disrepair.<sup>124</sup> Thus, where the obligation to maintain the dwelling is not expanded on in an agreement, the dictionary and ordinary meaning of the word “maintain” should prevail.<sup>125</sup> The obligation to maintain a usufruct dwelling is thus limited to keeping the property in the condition in which it was at the time of the commencement of the deed of usufruct, and excludes liability for any luxurious improvements.<sup>126</sup>

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<sup>119</sup> See part 4.4 above.

<sup>120</sup> See part 4.4 above.

<sup>121</sup> *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras 2 and 5; Van der Merwe “Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew” in *The Common Core of European Private Law Time Limited Interests in Land* 266.

<sup>122</sup> *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras 2 and 5; Van der Merwe “Case 5: Duty of the Holder of a Time-Limited Interest to Repair, Replace and Renew” in *The Common Core of European Private Law Time Limited Interests in Land* 266; Van der Walt *The Law of Servitudes* 480.

<sup>123</sup> Van der Walt *The Law of Servitudes* 480; *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras 19 and 30-31.

<sup>124</sup> *Lola v Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para 17.

<sup>125</sup> Para 17.

<sup>126</sup> Para 18.



## 4 5 Conclusion

The principles discussed above brought to light the following ideas or notions which need to be commented on as they help in establishing a standard of habitability in the context of a usufruct, and essentially begin to form the baseline for a definition of habitability in this context. These notions are “fit for human occupation”, “use and enjoyment”, and “maintaining the property in good repair”. “Fit for human occupation” means that the dwelling is free from serious disrepair or dilapidation. “Fit for human occupation” translates to “habitability” when the dwelling is safe and suitable for humans to occupy or live in. The notion of “fit for occupation” helps in establishing a standard of habitability in the context of usufructs as it informs how the property should look at the outset of the usufruct. For the usufruct to be habitable, it arguably should be safe and suitable to inhabit and free from serious disrepair.

The idea of “use and enjoyment” in turn encapsulates the rights to use the usufruct and to benefit from its fruits.<sup>127</sup> The notion of “use and enjoyment” implies that the usufruct is habitable. This is because the usufructuary can arguably not use and reap benefits from a dwelling that is not habitable. Thus, “use and enjoyment” of a dwelling translate to habitability when the purpose of the dwelling is for human habitation or occupation. As such, if the owner undertakes to give the usufructuary the right to use the dwelling which is not habitable, it defeats the initial purpose of conferring the right of use and enjoyment. This is because the state of disrepair of the property diminishes or negatively impacts on the usefulness of the dwelling. For the right to use and enjoy the dwelling to be conferred (or even benefit the usufructuary) the dwelling must arguably be habitable. Habitability and “use and enjoyment” are closely linked to one another in the sense that you cannot enjoy the use of a dwelling without it being habitable.

The concept of “maintaining the property in good repair” means the upkeep of the existing property in a condition that a reasonable person would expect of a usufruct. “Maintaining in good repair” is limited to repairs that are necessary to render the property useful and fit to inhabit so as to protect the dwelling from collapsing, deteriorating or falling into a state of ruin. This would mean that the owner or heir should ensure that the property is fixed to make it habitable or necessary repairs are

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<sup>127</sup> Van der Walt *The Law of Servitudes* 464-465; Glover *Kerr’s Law of Sale and Lease* 342.

carried out to place the property in good condition. The notion of “maintain in good repair” does not include luxurious repairs. “Maintaining the property in good repair” translates to habitability when the existing structure of the property is kept in safe and suitable condition for the purpose for which the usufruct was granted. The notion of “maintaining the property in good repair” entails maintaining the property in order to ensure that the usufruct is in a habitable condition. Accordingly, the notion of “maintaining property in good repair” arguably helps to establish a standard of habitability in the context of usufructs. All of these ideas or notions, in essence, begin to form the baseline for a definition of habitability. Habitability in light of these notions means a usufruct dwelling that is fit for human occupation in the sense that the property is suitable for the purpose for which the usufruct was granted. This includes having the full use and enjoyment of all benefits arising from the property and a usufruct property that is maintained in good repair. This essentially confirms a very unique standard of habitability in the context of a usufruct.

The minimum standard of habitability is presumably in line with the Constitution. This is because of the notions “fit for human habitation” or “use and enjoyment” or “maintain in good repair” as developed in case law, sufficiently protect the interests of usufructuaries. More importantly, these notions serve as a standard that could be used by usufructuaries to hold owners liable to ensure that the usufruct property is habitable. As such, there is arguably no need to develop the common-law construct of a usufruct as long as it is applied flexibly by courts. As I argued in part 4 3 above, courts are interpreting the lifting of certain restrictions in the will flexibly, but if they are rigid in their approach, it may potentially result in constitutional invalidity as certain constitutional rights may be disregarded. This arguably points towards a minimum standard of habitability for a usufruct.

As argued in part 4 4 above, the owner who grants the usufruct (his heir or his estate) bears the responsibility to ensure the habitability of a usufruct. The obligation entails that the owner should keep the usufruct property in the same condition throughout the usufruct. Where necessary, the owner must effect repairs for the benefit of the property so that the usufructuary may continue to enjoy the use of the dwelling. If the owner no longer has capital for repairs and the usufruct property becomes dangerous to inhabit and constitutional rights are implicated, the state has a

duty to provide habitability in the case of usufructs.<sup>128</sup> This is because the state has a duty to improve the quality of life of usufructuaries in line with the objectives of the preamble of the Constitution.<sup>129</sup> More importantly, the state has a duty to respect, protect, promote and fulfil the rights in the Bill of Rights such as human dignity, security of tenure or access to adequate housing.<sup>130</sup> If the state fulfils the obligation imposed by these constitutional provisions, the state acts in a manner that promotes the state's objectives in terms of section 152(1)(d), read together with section 26(2) of the Constitution.<sup>131</sup>

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<sup>128</sup> Compare *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 25 and 44.

<sup>129</sup> See chapter 2 part 2 3 1 above. Compare *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 16.

<sup>130</sup> See chapter 2 parts 2 3 4, 2 3 5 and 2 3 6 above. Compare *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 16.

<sup>131</sup> See chapter 2 parts 2 3 1 and 2 3 6 above. Compare *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 44.

## CHAPTER 5: HABITABILITY IN THE CONTEXT OF OCCUPIERS

### 5 1 Introduction

It has been 26 years of democracy in South Africa, but adequate housing that provides all occupiers<sup>1</sup> with secure tenure and dignified living conditions has not yet been fully attained.<sup>2</sup> As such, occupiers in South Africa are in search of attaining social justice by improving the quality of their lives for themselves and their families, especially since the state is failing to fulfil its obligation in this regard.<sup>3</sup> The search to attain social justice by occupiers is motivated by what is contained in the preamble of the Constitution of the Republic of South Africa, 1996 (“Constitution”) which states that the founding values of our society are human dignity, equality and freedom.<sup>4</sup> Thus, the pursuit of adequate housing that provides and protects one’s dignity lies at the heart of the Constitution on how to enforce human rights within an established constitutional

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<sup>1</sup> The dissertation is limited to ESTA occupiers who had consent or a right in law to occupy unless otherwise stated, and not to occupiers of other types of property. See chapter 1 part 1 footnote 3.

<sup>2</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 22, 111 and 154; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 2; *Mwelase v Director-General for the Department of Rural Development & Land Reform* 2019 6 SA 597 (CC) para 3.

<sup>3</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 1.

<sup>4</sup> The preamble of the Constitution; Section 1(a) of the Constitution; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 1 and 23; *Soobramoney v Minister of Health, KawZulu-Natal* 1998 1 SA 765 (CC) paras 8-9; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 110 and 132; *Nelson Mandela Foundation Trust v Afriforum NPC* 2019 6 SA 327 (GJ) para 13; S Liebenberg “Violations of Socio-Economic Rights: The Role of the South African Human Rights Commission” in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law* (2001) 405 409; D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 188; AJ van der Walt “A South African Reading of Frank Michelman’s Theory of Social Justice” in H Botha, AJ van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 163; D Moseneke “Transformative Adjudication in Post-Apartheid South Africa – Taking Stock after a Decade” (2007) 21 *Speculus Juris* 2 4; JC Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 2 ed (2013) 61-62; D Bhana “The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution” (2013) 29 *South African Journal on Human Rights* 351 352.

democracy.<sup>5</sup> This is because the Constitution is a transformative document providing the mandate and framework that can be used to change our society into one where everyone (including occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”)) live in dignity.<sup>6</sup> Accordingly, as stressed by Froneman J in *Daniels v Scribante* (“*Daniels*”),<sup>7</sup> there is no need for occupiers to continue to live in inhumane and undignified living conditions on farms.<sup>8</sup> The Constitution obliges the court in the adjudication of human rights to heal the injustices of the past and to improve the quality of lives of everyone, including those of occupiers.<sup>9</sup> This brings us to the subject matter of this chapter, namely, the habitability of dwellings in the context of occupiers.

Habitability in this context has become a constitutional issue of great significance to the development of the relationship between an occupier and an owner in South Africa. Interestingly, questions arose before the Constitutional Court in the decision of *Daniels*. In this case, the court found that an occupier of farmland was entitled in terms of ESTA to effect improvements on a dwelling belonging to a landowner without said landowner’s consent in order to make the occupier’s dwelling more habitable. ESTA did not specifically provide for such a right and the court had to adopt a purposive interpretation of the Act.<sup>10</sup> The occupier’s rights that were implicated included the right to security of tenure in terms of section 25(6) of the Constitution and the right to human

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<sup>5</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 2; *Soobramoney v Minister of Health, KawZulu-Natal* 1998 1 SA 765 (CC) para 8.

<sup>6</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 110; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> paras 33-34; *Soobramoney v Minister of Health, KawZulu-Natal* 1998 1 SA 765 (CC) para 8; *Rates Action Group v City of Cape Town* 2004 5 SA 545 (C) para 100; cited in S Liebenberg “South Africa: Adjudicating Social Rights under a Transformative Constitution” in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 75 76.

<sup>7</sup> *Daniels v Scribante* 2017 4 SA 341 (CC).

<sup>8</sup> Para 132.

<sup>9</sup> The preamble of the Constitution. See also *Daniels v Scribante* 2017 4 SA 341 (CC) para 132; ZT Boggenpoel “Property” (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1; ZT Boggenpoel “(Re)defining the Contours of Ownership: Moving Beyond White Picket Fences” (2019) 30 *Stellenbosch Law Review* 234 246; J Brickhill, M Finn & K Moshikaro “Constitutional Law” (2017) 2 *Juta’s Quarterly Review of South African Law* 2.3.1.

<sup>10</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 23-24.

dignity under section 10 of the Constitution.<sup>11</sup> The judgment in *Daniels* has inspired some interesting issues for consideration such as the meaning of the habitability of dwellings inhabited by occupiers. More importantly, it becomes necessary to determine on whom the obligation rests to ensure that the dwelling of occupiers is “habitable”.

The opening part of this chapter will reflect on the meaning of habitability in the context of occupiers to determine whether the legislation aimed at protecting occupiers provides for an individual standard of habitability for this category of inhabitants. The assumption is that occupiers enjoy the right to reside on, and use of, a dwelling accorded to them in terms of ESTA, which seems to imply an individual standard of habitability.

The next segment of this chapter will scrutinise the impact of the Constitution on the standard of habitability for occupiers in light of the right to legally secure tenure, and the right to human dignity in section 10 of the Constitution. The assumption is that an analysis of the impact of the Constitution on the standard of habitability for occupiers will display a link between security of tenure and habitability, and the right to access to adequate housing and human dignity as enshrined in the Constitution and given effect to by ESTA. Consequently, it will be argued that such a link implies a minimum standard of habitability for occupiers.

The third section will explore the obligation to ensure habitability to ascertain who bears such a duty in the owner-occupier relationship. More specifically, it will question whether such an obligation rests on a private landowner, the occupier, or the state. It is assumed that the obligation to ensure habitability rests on the owner in so far as it ensures the promotion of safe and suitable living conditions for

## **5 2 Meaning of habitability in the context of occupiers**

### **5 2 1 *ESTA and habitability***

ESTA, the legislation aimed at protecting the rights of occupiers, does not define the term “habitability” for purposes of the standard that occupiers can expect from the dwellings that they inhabit. As such, reliance has been placed on the common law of

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<sup>11</sup> See chapter 2 above.



“suitable for human habitation” in the context of occupiers.<sup>12</sup> The Constitutional Court has recently highlighted the meaning of habitability in the context of occupiers in the case of *Daniels*. This case is discussed in some detail below.

## 5 2 2 Case law and habitability

### 5 2 2 1 *Daniels v Scribante*

In this case, the occupier was residing on a farm owned by a private landowner with rights protected in terms of ESTA.<sup>13</sup> The dwelling of the occupier required certain necessary improvements to make it habitable.<sup>14</sup> These improvements included: (a) levelling the floors; (b) paving an outside part of the yard; (c) installing an indoor water supply; (d) installing a washing basin; (e) adding a window; and (f) repairing the ceiling.<sup>15</sup> The owner (or the person in charge) admitted that without the improvements the dwelling was not habitable and therefore resulted in a violation of the occupier’s right to human dignity.<sup>16</sup> The occupier desired to effect the improvements to the dwelling at her own expense.<sup>17</sup> She communicated her intention to make the

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<sup>12</sup> See, for example, *Daniels v Scribante* (LCC164/2015) [2015] ZALCC 13 (4 December 2015) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2015/13.html>> para 10, 14 and 20; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 7, 27, 193, 199 and 203.

<sup>13</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 3-4.

<sup>14</sup> Paras 6-7.

<sup>15</sup> Paras 7, 112 and 207.

<sup>16</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 7. See further *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 15; Boggenpoel (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1; Du Toit *An Evaluation of the National Health Insurance Scheme* 73; Madlanga (2018) *Stellenbosch Law Review* 359 372; C Pienaar “Improvement of Structures by Farm Dwellers” *Stock Farm* (04-12-2017) 14; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 991; Pienaar (2017) 2 *Juta’s Quarterly Review of South African Law* 2.2.

<sup>17</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 8. See further Boggenpoel (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 7; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 991; Pienaar (2017) 2 *Juta’s Quarterly Review of South African Law* 2.2; Slade (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1; Brickhill, Finn & Moshikaro (2017) 2 *Juta’s Quarterly Review of South African Law* 2.3.1; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 169.

improvements to the person in charge of the farm.<sup>18</sup> However, the occupier did not receive any response and she went on to effect the improvements herself.<sup>19</sup> The landowner demanded that the maintenance work must cease on the grounds that the owner had refused consent for the effecting of improvements.<sup>20</sup>

The occupier consequently approached the Magistrate's Court and the Land Claims Court for relief on the grounds that the improvements could be effected in terms of sections 5 and 6 of ESTA. Both courts held that ESTA did not specifically provide for such a right. On this basis, the Supreme Court of Appeal dismissed an application for leave to appeal. Leave to appeal was however granted to the Constitutional Court where the court had to consider whether section 5 of ESTA afforded an occupier the right to make improvements to his or her dwelling to bring the dwelling to a standard that conforms to conditions of human dignity. The court had to further consider whether section 5 (read together with section 6) of ESTA provided for the right to make improvements without the consent of an owner.<sup>21</sup> This is because ESTA did not

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<sup>18</sup> Section 1 of ESTA provides that a person in charge of land is "a person who at the time of the relevant act, omission or conduct had or has legal authority to give consent to a person to reside on the land in question". See also *Daniels v Scribante* 2017 4 SA 341 (CC) para 4, especially footnote 8.

<sup>19</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 8-9. See further Pienaar et al (2018) *South African Public Law* 1 7; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 991; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 169.

<sup>20</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 9; *Daniels v Scribante* (LCC164/2015) [2015] ZALCC 13 (4 December 2015) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2015/13.html>> para 12. See further ZT Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; J Brickhill, M Finn & K Moshikaro "Constitutional Law" (2007) 4 *Juta's Quarterly Review of South African Law* 2.3.1; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 169; Pienaar et al (2018) *South African Public Law* 1 7; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 991; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Matlala (2017) *De Rebus* 27 30; Morare (2017) *Land Digest* 1 1; Marais & Muller (2018) *South African Law Journal* 767; Du Toit *An Evaluation of the National Health Insurance Scheme* 73; C Pienaar "Improvement of Structures by Farm Dwellers" *Stock Farm* (04-12-2017) 14; Rautenbach (2017) *Litnet Akademies* 959 961.

<sup>21</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 10-11. See further *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 15 Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; ZT Boggenpoel "Property" (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 7; Van der Merwe

expressly provide for the right to make improvements without the permission of the owner.

The Constitutional Court was also confronted with the question of whether in terms of sections 25(6) of the Constitution the occupier was entitled to effect improvements to the dwelling at the occupier's own expense to make such a dwelling habitable.<sup>22</sup> In this regard, it was also important to determine whether, in terms of section 8(2) of the Constitution, the private landowner owed a positive duty to the occupier to ensure that the occupier lived in habitable conditions with dignity.<sup>23</sup> The last two issues on constitutional imperatives are dealt with later in this chapter.<sup>24</sup> Nevertheless, to ascertain whether the right to make improvements was an entitlement in terms of ESTA, it was valuable for the court to analyse sections 5 and 6 of ESTA.

Section 5 of ESTA deals with the fundamental rights of an occupier, an owner and a person in charge of land. Section 5(a) provides that:

"Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, an occupier ... shall have the right to human dignity".<sup>25</sup>

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& Pienaar (2017) *Annual Survey of South African Law* 991; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Matlala (2017) *De Rebus* 27 30; Morare (2017) *Land Digest* 1 1; Marais & Muller (2018) *South African Law Journal* 767-768; Davis (2019) *South African Law Journal* 420 421 and 426.

<sup>22</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 11-13.

<sup>23</sup> Paras 37-49. See also Rautenbach (2017) *Litnet Akademies* 959 962; DM Davis "Judicial Education in a Transformative Context" (2018) 1 *South African Judicial Education Journal* 25 27.

<sup>24</sup> See part 5 4 below.

<sup>25</sup> Section 5(a) of ESTA. See further *Daniels v Scribante* 2017 4 SA 341 (CC) paras 26 and 212; *Daniels v Scribante* (LCC164/2015) [2015] ZALCC 13 (4 December 2015) *SAFLII* <<http://www.saflii.org/za/cases/ZALCC/2015/13.html>> para 17; *Hattingh v Juta* 2013 3 SA 275 (CC) para 31; *Sandvliet Boerdery (Pty) Ltd v Mampies* 2019 6 SA 409 (SCA) para 14; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) *SAFLII* <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> paras 53 and 55; *Nkosi v Bührmann* 2002 1 SA 372 (SCA) para 24; MJ Roodt "Security of Tenure and Livelihood Options in South Africa – A Case Study of a Rural Community Facing Eviction under Post-Apartheid Legislation in the Eastern Cape Province" (2007) 37 *Africanus* 5; Slade (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Marais & Muller (2018) *South African Law Journal* 768; Davis (2019) *South African Law Journal* 420 421.

It is clear that section 5 of ESTA includes the occupier's right to human dignity.<sup>26</sup> Thus, occupiers are entitled in terms of the right to human dignity enshrined in ESTA to have their security of tenure protected by law against forced removals from land due to intolerable conditions on that land, as was evident in *Daniels*.<sup>27</sup> As such, the right to human dignity must be interpreted consistently with the right to security of tenure.<sup>28</sup> This follows from the fact that land with secure tenure is important for the dignity of occupiers.<sup>29</sup>

Section 5(a) of ESTA originates from or is with due regard to section 10 of the Constitution, which states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."<sup>30</sup> The Constitutional Court has decided on human dignity in several cases and emphasised the importance of human dignity in our constitutional dispensation.<sup>31</sup> More specifically, there are a number of cases decided on human dignity, especially in the context of occupiers, where the right to security of tenure and housing are also affected.<sup>32</sup> The cases show that human dignity

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<sup>26</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 29 and 212. See further *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 19; *Sandvliet Boerdery (Pty) Ltd v Mampies* 2019 6 SA 409 (SCA) paras 14 and 27; Roodt (2007) *Africanus* 5; Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 7 and 10; D Matlala "The Law Reports" (2017) *De Rebus* 27 30; TE Scheepers & W du Plessis "Extension of Security of Tenure Act – A Bone of Contention" (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 473 475; Davis (2019) *South African Law Journal* 420 422.

<sup>27</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 23 and 31-34. See also *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> para 55.

<sup>28</sup> *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> para 55. See also *Daniels v Scribante* 2017 4 SA 341 (CC) para 23.

<sup>29</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 2.

<sup>30</sup> Section 5 of ESTA.

<sup>31</sup> See chapter 2 part 2 3 4 above.

<sup>32</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 29 and 42; *Jafftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 39; *Daniels v Scribante* 2017 4 SA 341 (CC) paras 1-34; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> paras 19 and 32-38.

relates to the intrinsic worth of all human beings.<sup>33</sup> This means that human beings should be treated as human beings and not as objects.<sup>34</sup> Human dignity has been used by the courts to inform, enhance and possibly reinforce all the other rights enshrined in the Bill of Rights.<sup>35</sup> This is because human dignity serves as a source of many other rights.<sup>36</sup>

In the context of occupiers, human dignity is specifically invoked to contradict the result of past discriminatory laws and practices in which the human dignity of occupiers in South Africa was deliberately denied.<sup>37</sup> In this respect, human dignity is used to inform the future and develop a democratic South Africa where the human dignity of everyone, including occupiers, is fully respected and protected.<sup>38</sup> This would mean that occupiers are entitled to lead their present and future lives in conditions of human dignity no matter where they stay.<sup>39</sup> It is here where section 6 of ESTA, which states the rights and duties of the occupier in respect of where they stay, is important. Section 6(1) provides as follows:

“Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February, 1997,

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<sup>33</sup> See specifically *S v Makwanyane* 1995 3 SA 391 (CC) para 328; *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 1 SA 984 (CC) para 48; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 120, particularly footnote 140.

<sup>34</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 29, especially footnote 29.

<sup>35</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 41; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) paras 43-51, where the court essentially pointed out that human dignity informs the rights to property; Marais & Muller (2018) *South African Law Journal* 774, particularly footnote 66.

<sup>36</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 144 and 328.

<sup>37</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 23. See also *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

<sup>38</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35. See also *Daniels v Scribante* 2017 4 SA 341 (CC) paras 131 and 137.

<sup>39</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 137. See also *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 18.



and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.”<sup>40</sup>

In light of the above, it is clear that the right enjoyed by an occupier in terms of section 6(1) of ESTA is a right to reside on and use the land.<sup>41</sup> Moreover, an occupier enjoys the right to human dignity in terms of section 5(a) of ESTA.<sup>42</sup> In *Daniels*, the owner (or the person in charge) argued that section 6 does not provide for the right to make improvements as asserted by the occupier. This was so as section 6 does not have an explicit provision that stipulates that an occupier has a right to make improvements meant to bring his or her dwelling into a standard suitable for human habitation.<sup>43</sup>

In *Daniels*, Madlanga J acknowledged that section 6 does not explicitly provide that an occupier has the right to make improvements aimed to make the dwelling more

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<sup>40</sup> Section 6(1) of ESTA; quoted in *Daniels v Scribante* 2017 4 SA 341 (CC) para 26; *Daniels v Scribante* (LCC164/2015) [2015] ZALCC 13 (4 December 2015) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2015/13.html>> para 17; *Dlamini v Joosten* 2006 3 All SA 1 (SCA) para 16; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> para 56; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 19; *Hattingh v Juta* 2013 3 SA 275 (CC) para 31; *Nkosi v Bührmann* 2002 1 SA 372 (SCA) para 24; Mostert, Pienaar & Van Wyk “Land Reform” in *LAWSA* para 134; Matlala (2017) *De Rebus* 27 30; T Mbhense “Does ESTA still Protect Occupiers of Farm Land in South Africa?” (2014) *De Rebus* 22 23; Scheepers & Du Plessis (1998) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 473 475; Davis (2019) *South African Law Journal* 420 421.

<sup>41</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 31; *Daniels v Scribante* (LCC164/2015) [2015] ZALCC 13 (4 December 2015) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2015/13.html>> para 18. See also Pienaar et al (2018) *South African Public Law* 1 7; Scheepers & Du Plessis (1998) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 473 475; Mbhense (2014) *De Rebus* 22 23.

<sup>42</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 31. See also *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 19; Scheepers & Du Plessis (1998) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 473 475; Davis (2019) *South African Law Journal* 420 422.

<sup>43</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 27. See also *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 15; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 170; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1.



habitable.<sup>44</sup> However, he mentioned that whether the right to make improvements exists, depends on a purposive interpretation of section 6 read together with section 5 of ESTA.<sup>45</sup> Consequently, Madlanga J proceeded to interpret the word “reside” as it is used in section 6(1) of ESTA. He pointed out that on a proper interpretation of the word “reside”, an occupier could not live on property under the most deplorable conditions that impair his or her human dignity in terms of section 5(a) of ESTA.<sup>46</sup> The word “reside” in ESTA was therefore interpreted to mean that the occupier’s right to *reside on and use* the dwelling must be on a level that is compatible with human dignity and other fundamental rights.<sup>47</sup> In this regard, the court in *Daniels* gave substance to the word “reside” based on human dignity and other fundamental rights.<sup>48</sup> Thus, *to reside on* implies, at the very least, that the dwelling must be habitable, which is linked to certain other fundamental rights such as security of tenure, human dignity and adequate housing, amongst others.<sup>49</sup> This clearly confirms an individual standard of habitability for occupiers.

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<sup>44</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 27. See also Davis (2019) *South African Law Journal* 420 422; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 170; Brickhill, Finn & Moshikaro (2017) 2 *Juta’s Quarterly Review of South African Law* 2.3.1.

<sup>45</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 27. See further *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) paras 15-16; Davis (2019) *South African Law Journal* 420 422; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 170; Brickhill, Finn & Moshikaro (2017) 2 *Juta’s Quarterly Review of South African Law* 2.3.1.

<sup>46</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 31. See also Davis (2019) *South African Law Journal* 420 422.

<sup>47</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-32. See further *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 16; C Pienaar “Improvement of Structures by Farm Dwellers” *Stock Farm* (04-12-2017) 15; A Nolan “*Daniels v Scribante*: South Africa Pushes the Boundaries for Horizontality and Social Rights” (2017) *International Journal of Constitutional Law Blog* 1/3; Boggenpoel (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 7; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 991-992; Pienaar (2017) 2 *Juta’s Quarterly Review of South African Law* 2.2; Matlala (2017) *De Rebus* 27 30; Rautenbach (2017) *Litnet Akademies* 959 962; Davis (2019) *South African Law Journal* 420 422 and 426.

<sup>48</sup> Davis (2019) *South African Law Journal* 420 430.

<sup>49</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-32; *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 16; C Pienaar “Improvement of Structures by Farm Dwellers” *Stock Farm* (04-12-2017) 15; Nolan (2017) *International Journal of Constitutional Law Blog* 1/3; Boggenpoel (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 7; Van der Merwe & Pienaar (2017) *Annual Survey of*

The court in *Daniels* arguably adopted an interpretation that best advances the purpose of ESTA, which was not only about providing occupiers secure tenure, but also affording occupiers the human dignity that they were denied in terms of colonial and apartheid laws. In this regard, the court clearly adopted an interpretation of ESTA that promotes the spirit and object of the Bill of Rights.<sup>50</sup> As such, it is submitted that section 39(2), which provides for legislation to be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights, would not have led to a stretched interpretation of ESTA as advanced by Marais and Muller.<sup>51</sup> It would, however, allow for an interpretation that could give occupiers the best possible protection of their constitutional rights.<sup>52</sup> In this regard, it should be emphasised that a court should adopt an interpretation that promotes constitutional rights and values even in instances where the meaning of the provision to be interpreted seems to be clear and not vague.<sup>53</sup> In *Daniels*, the occupier argued that she was entitled, without the landowner's consent, to effect improvements that are reasonably necessary to achieve the rights contained in section 5 of ESTA, more especially the right to human dignity.<sup>54</sup> Based on the need for the occupier to live in a dwelling that accords with human dignity, the Constitutional Court interpreted ESTA in a manner that promoted the spirit, purport and objects of the Bill of Rights.<sup>55</sup>

Thus, if an owner denies an occupier the right to make improvements to the dwelling, such a denial impacts on the habitability of the dwelling and may eventually

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*South African Law* 992; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Matlala (2017) *De Rebus* 27 30; Rautenbach (2017) *Litnet Akademies* 959 962; Davis (2019) *South African Law Journal* 420 422 and 426.

<sup>50</sup> Section 39(2) of the Constitution. See also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 46.

<sup>51</sup> See, for example, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) para 24; *Daniels v Scribante* 2017 4 SA 341 (CC) para 23.

<sup>52</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 25, quoting *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

<sup>53</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 4 SA 490 (CC) para 90; cited in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

<sup>54</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 8 and 10.

<sup>55</sup> Paras 25 and 29-30.

deprive the occupier of his or her human dignity.<sup>56</sup> Moreover, if the dwelling is not habitable, it may lead to the occupier's departure because the living conditions do not protect his or her human dignity and other constitutional rights.<sup>57</sup> The court further cautioned owners and persons in charge not to unreasonably deny occupiers the right to make improvements as the lives of such occupiers are often organised around where they reside.<sup>58</sup> Therefore, housing for occupiers is about living in conditions that are compatible with human dignity and the other fundamental rights itemised in section 5 of ESTA.<sup>59</sup> It was based on a combined reading of sections 5(a) and 6(1) that the Constitutional Court eventually held that ESTA provides an occupier with the right to make improvements to the dwelling to make it habitable without the owner's consent.<sup>60</sup> However, the court limited the improvements to those that are reasonably necessary to save the dwelling from perishing, deteriorating or depreciating.<sup>61</sup>

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<sup>56</sup> Paras 33-34. See also Davis (2019) *South African Law Journal* 420 422.

<sup>57</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 33. See also Davis (2019) *South African Law Journal* 420 422.

<sup>58</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 33.

<sup>59</sup> Para 31.

<sup>60</sup> Paras 57, 59-60, 193, 210, 212 and 217. See further Nolan (2017) *International Journal of Constitutional Law Blog* 1/3; IM Rautenbach "Overview of Constitutional Court Judgments on the Bill of Rights – 2017" (2018) *Tydskrif vir die Suid-Afrikaanse Reg* 367 372; Rautenbach (2017) *Litnet Akademies* 959 959-960; Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Boggenpoel (2019) *Stellenbosch Law Review* 234 246 and 247; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 170; D Hornby, A Nel, S Chademana & N Khanyile "A Slipping Hold? Farm Dweller Precarity in South Africa's Changing Agrarian Economy and Climate" (2018) 7 *Land* 1 12, particularly footnote 22; Pienaar et al (2018) *South African Public Law* 1 8-9; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 993-994; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Slade (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Matlala (2017) *De Rebus* 27 30; S Rosa *The Means and the Ends of Justice: The Interaction Between Socio-Economic Rights and Administrative Justice in a South African Democratic Developmental State* LLD dissertation, Stellenbosch University (2017) 138-139; Marais & Muller (2018) *South African Law Journal* 768-769; Du Toit *An Evaluation of the National Health Insurance Scheme* 74; C Pienaar "Improvement of Structures by Farm Dwellers" *Stock Farm* (04-12-2017) 14; *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 16.

<sup>61</sup> See *Daniels v Scribante* 2017 4 SA 341 (CC) para 32. For a discussion of necessary improvements, see *Immaculate Truck Repairs CC v Capital Acceptances Ltd* [2017] ZAFSHC 20 (16 February 2017) SAFLII <<http://www.saflii.org/za/cases/ZAFSHC/2017/20.html>> para 29; *United Building Society v Smookler's Trustees & Golombick's Trustee* 1906 TS 623 627;

Allowing the occupier to make necessary improvements without the owner's permission does not mean that the owner of the dwelling does not have rights, or that the occupier can do what he or she wants in relation to the property. According to Ngcukaitobi AJ in *Sibanyoni v Holtzhausen* ("*Sibanyoni*"),<sup>62</sup> transformative constitutionalism requires that an appropriate balance be struck between the conflicting rights or interests of landowners and occupiers in terms of ESTA.<sup>63</sup> Thus, the right to make improvements to bring the dwelling to a habitable standard, which would conform to conditions of human dignity, can only be limited on the grounds that they "are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".<sup>64</sup> This limitation on the rights of the owner was taken into account implicitly when the court ordered that the entitlement to make improvements required engaging meaningfully<sup>65</sup> with all parties concerned to avoid

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*Land Bank v Mans* 1933 CPD 16 24; *Lechoana v Cloete* 1925 AD 536 547; *King's Hall Motor Co v Wickens & Minicol* 1931 NPD 37 39; JG Lotz "Enrichment" in WA Joubert & JA Faris (eds) *The Law of South Africa* 2 ed Vol 9 (2005) para 229; ZT Boggenpoel "Property" (2017) 1 *Juta's Quarterly Review of South African Law* 2.2; Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; MM Corbett "*Fideicommissa*" in HR Hahlo, MM Corbett, G Hofmeyr & E Kahn (eds) *The Law of Succession in South Africa* 2 ed (2001) 259 312; Muller et al *Silberberg and Schoeman's The Law of Property* 520, particularly footnote 235; S Eiselen & G Pienaar *Unjustified Enrichment: A Casebook* 3 ed (2008) 218; J du Plessis *The South African Law of Unjustified Enrichment* (2012) 279; JC Sonnekus *Unjustified Enrichment in South African Law* (2008) 80; D Visser *Unjustified Enrichment* (2008) 600.

<sup>62</sup> *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>>.

<sup>63</sup> Para 50.

<sup>64</sup> Section 5(a) of ESTA, originating from section 36(1) of the Constitution. See further *Daniels v Scribante* 2017 4 SA 341 (CC) paras 54 and 212; Scheepers & Du Plessis (1998) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 473 475.

<sup>65</sup> The concept of "meaningful engagement" generally means a process in which two or more parties talk and listen to each other meaningfully in order to achieve certain objectives. In this regard, meaningful engagement is used as a deliberative tool to resolve disputes and to increase the understanding and sympathetic care of the parties affected if the parties are willing to participate in the process. See generally *Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 14-15. See further G Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" (2011) 3 *Stellenbosch Law Review* 472 743-744 and 753-756; G Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 301-302 and 311-314; S Mahomed *The Potential of Meaningful Engagement in Realising Socio-Economic Rights: Addressing Quality Concerns* LLM thesis, Stellenbosch University (2019) 3-8; L Chenwi & K Tissington *Engaging Meaningfully with Government on Socio-Economic Rights – A Focus on the Right to Housing* (2010) 9; L Chenwi "Meaningful

the violation of the owner's right to property under section 25 of the Constitution and those set out in ESTA.<sup>66</sup> In this regard, the court ordered the parties to meaningfully engage with regard to implementing the proposed necessary improvements. Crucially, this included an engagement on the need and approval of the building to determine whether they were in fact necessary improvements. Furthermore, the parties had to agree on the arrival and departure time and the movement of the constructors on the farm.<sup>67</sup> Thus, the court concluded that if meaningful engagement between the owner or person in charge and the occupier does not result in an acceptable outcome, any one of the parties can approach a court to have the dispute arising from failure to engage meaningfully resolved by a court of law.<sup>68</sup> This is because if an occupier

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Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *Southern African Public Law* 128 129; S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" (2012) 12 *African Human Rights Law Journal* 1 13-28; S van der Berg "Meaningful Engagement: Proceduralising Socio-Economic Rights further or Infusing Administrative Law with Substance? (2013) 29 *South African Journal on Human Rights* 376 381-388.

<sup>66</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 61-65 and 217. See further Nolan (2017) *International Journal of Constitutional Law Blog* 1/3 3/3; Rautenbach (2018) *Tydskrif vir die Suid-Afrikaanse Reg* 367 372; Rautenbach (2017) *Litnet Akademies* 959 962-963; Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 8-10; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 994; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Slade (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 170; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1; Matlala (2017) *De Rebus* 27 30; Marais & Muller (2018) *South African Law Journal* 769; C Pienaar "Improvement of Structures by Farm Dwellers" *Stock Farm* (04-12-2017) 15; Davis (2019) *South African Law Journal* 420 422.

<sup>67</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 71. See further Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1, especially footnote 14; Pienaar et al (2018) *South African Public Law* 1 9; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 994; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Slade (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Matlala (2017) *De Rebus* 27 30; Rosa *The Means and the Ends of Justice* 139; Du Toit *An Evaluation of the National Health Insurance Scheme* 74; Rautenbach (2017) *Litnet Akademies* 959 963; Davis (2019) *South African Law Journal* 420 422.

<sup>68</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 65, citing *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) para 152. See further *Van Rensburg v Coetzee* 1979 4 SA 655 (A) 676-678; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 35; Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018)



effects improvements on the dwelling to the total disregard of a private landowner and/or without recourse to a court of law, such an act amounts to self-help. This would effectively encourage the occupier to take the law into his or her own hands.<sup>69</sup> *Daniels* indicates that habitability is fundamentally important to enjoy constitutional rights such as human dignity. If the dwelling is not habitable, it may impact on the human dignity of the occupier and that may lead to the occupier vacating the dwelling due to unacceptable living conditions. The meaning of habitability in the context of occupiers was also highlighted in the case of *Erasmus v Mtenje* (“*Mtenje*”).<sup>70</sup> This case is discussed below.

## 5 2 2 2 *Erasmus v Mtenje*

In *Mtenje*, the occupier had a right to reside on land guaranteed in terms of ESTA. The occupier and his family were residing on a portion of immovable property belonging to the owner.<sup>71</sup> The occupier was living in a small rented room and was found by the owner to be operating an illegal spaza shop on the property.<sup>72</sup> On instruction of the landowner, the building where the occupier lived and operated the small store was

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*South African Public Law* 1 9; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 994; Pienaar (2017) 2 *Juta’s Quarterly Review of South African Law* 2.2; Slade (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1; Matlala (2017) *De Rebus* 27 30; C Pienaar “Improvement of Structures by Farm Dwellers” *Stock Farm* (04-12-2017) 15; Rautenbach (2017) *Litnet Akademies* 959 963.

<sup>69</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 65, referring to *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC) para 14. See further *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) para 87; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 35; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> para 99; *Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) paras 17-8; discussed and analysed in LR Ngwenyama *The Impact of Section 34 of the Constitution of the Republic of South Africa, 1996 on Banking Law* LLM thesis, University of Johannesburg (2016) 12-16; Pienaar et al (2018) *South African Public Law* 1 9; Slade (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1; C Pienaar “Improvement of Structures by Farm Dwellers” *Stock Farm* (04-12-2017) 15.

<sup>70</sup> *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>>.

<sup>71</sup> Para 3.

<sup>72</sup> Para 9.



subsequently destroyed.<sup>73</sup> Due to the building being demolished, the occupier and his family were left destitute in three army styled tents in the same area where the destroyed building was initially built.<sup>74</sup>

After some time, the tents were no longer fit for human habitation as they started to fall apart. Importantly, the tents could not protect the occupier, for example, from weather conditions. This led the occupier, without the owner's permission, to build for himself and his family a structure to ensure that he was protected from harsh conditions.<sup>75</sup> It should be mentioned that the structure was not completely built.<sup>76</sup> Furthermore, the occupier erected the structure to avoid living in undignified conditions that he endured for a decade residing in tents.<sup>77</sup> The structure was temporary in nature as it was built out of corrugated iron sheets and poles. The floor of the structure consisted of combined sand and concrete and there were no partitions. The structure had seven windows, a double door at the front and a single door at the back, but not all the windows had glass.<sup>78</sup> The court conducted an *in loco* inspection to determine the living conditions of the occupier and his family and the physical condition of the structure.<sup>79</sup> The court was specifically called upon to decide whether the newly erected structure was fit for human occupation. The inspection showed that the previous structure of the occupier had double brick walls outside and a concrete floor. Moreover, the inspection indicated that the occupier's current location lacked lavatory facilities. As such, the occupier and his family had to use a nearby veld as a toilet facility.<sup>80</sup> The inspection also revealed that the occupier had been denied a tap to access water. The only water supply was through a municipal tank or from a tank that was placed near the fence where the main house was located. Furthermore, the inspection revealed that the new structure in question was incomplete and not yet in a habitable state. Thus, the occupier and his family were still living in the tents.<sup>81</sup>

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<sup>73</sup> Para 9.

<sup>74</sup> Para 9.

<sup>75</sup> Paras 12-13.

<sup>76</sup> Para 14.

<sup>77</sup> Para 13.

<sup>78</sup> Para 15.

<sup>79</sup> Para 2.

<sup>80</sup> Para 14.

<sup>81</sup> Para 14.

According to the court, following the case of *Daniels* concerning the habitability of a dwelling, the new structure that the occupier built was not habitable.<sup>82</sup> In light of this, the court found that replacing tents with an informal structure provides occupiers with better *protection from the elements* and offers the occupiers of these tents with *some measure of human dignity*.<sup>83</sup> The court in this regard correctly identified one element of habitability, namely protection from the elements as contained in the CESCR's General Comment 4,<sup>84</sup> but did not explicitly invoke the CESCR's General Comment 4. Furthermore, the court envisaged a minimum standard of habitability that is based on human dignity. The court's reliance on human dignity to inform the meaning of habitability (as shown in *Mtenje*) properly upholds the human dignity afforded to occupiers by section 5 of ESTA, reinforced by section 10 of the Constitution.

In *Mtenje*, the owner sought interdictory relief and a demolition order from the Land Claims Court. The interdict was sought to prevent the occupier from continuing to build the structure which was erected without the consent of the owner on her immovable property.<sup>85</sup> Moreover, the interdict was sought to prevent the occupier from living in the structure and order the occupier to vacate the structure. Furthermore, the owner wanted to be formally authorised to demolish the structure.<sup>86</sup> The court had to decide whether the owner had met the requirements for an interdict.<sup>87</sup>

The fact that Erasmus owned the property might have given her a clear right to launch an application of this nature under Roman-Dutch law. However, this was no longer the position in the new constitutional dispensation.<sup>88</sup> The court mentioned that an occupier is entitled to certain residential rights in respect of land they reside on and

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<sup>82</sup> Para 14.

<sup>83</sup> Para 34.

<sup>84</sup> See section 5 3 below.

<sup>85</sup> *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> paras 1 and 16.

<sup>86</sup> Paras 1 and 16.

<sup>87</sup> These requirements were: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy. However, the court was not satisfied that these requirements are met. See *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> paras 16-18.

<sup>88</sup> *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 19.

use. This entails, at the very least, a right to live on habitable land with dignity.<sup>89</sup> The court concluded that the owner had failed to fulfil the first requirement of an interdict and it was therefore not necessary to deal with the other requirements.<sup>90</sup> The court in *Mtenje* mentioned that despite the relationship between the occupier and owner being broken down, it was important for both parties to meaningfully engage with each other concerning the issue at hand prior to taking the law into their own hands. In this regard, the court essentially reinforced the earlier *dictum* of the court in *Daniels*.<sup>91</sup> It should be mentioned that the duty to meaningfully engage with the owner rests on the occupier in so far as ensuring that the occupier's dwelling is in a habitable state.<sup>92</sup> Thus, the failure by the occupier to engage meaningfully with the owner regarding the necessity to upgrade the occupier's living condition was contentious. Therefore, to deny the occupier the right to upgrade his dwelling in the circumstances of *Mtenje* was, according to the court, "too formalistic and unjust" in light of South Africa's history of disposessions.<sup>93</sup> The following section provides an analysis of the cases of *Daniels* and *Mtenje*.

### 5 2 3 Assessment

The case of *Daniels* has practical implications when one reflects on the notion of habitability in the context of occupiers. The court held that to "reside on" for purposes of ESTA, means that the dwelling must be habitable.<sup>94</sup> In this regard, the court in *Daniels* linked habitability to the right to reside in terms of ESTA. Reside generally means to live at a place permanently and depends on the facts of each case.<sup>95</sup> As the

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<sup>89</sup> Para 19.

<sup>90</sup> Para 19.

<sup>91</sup> Para 33, citing *Daniels v Scribante* 2017 4 SA 341 (CC) para 62.

<sup>92</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 62-65.

<sup>93</sup> *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 33, referring to *Daniels v Scribante* 2017 4 SA 341 (CC) para 67.

<sup>94</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 32. See further *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 16; C Pienaar "Improvement of Structures by Farm Dwellers" *Stock Farm* (04-12-2017) 14-15; Nolan (2017) *International Journal of Constitutional Law Blog* 1/3; Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 7; Matlala (2017) *De Rebus* 27 30.

<sup>95</sup> Section 1(h) of the Extension of Security of Tenure Amendment Act 2 of 2018. See further *Sandvliet Boerdery (Pty) Ltd v Mampies* 2019 6 SA 409 (SCA) para 19; *Kiepersol Poultry Farm*

right to reside on for the purposes of ESTA means that the dwelling has to be habitable, it follows that an occupier is entitled to use the land on which he or she resides. However, the occupier cannot enjoy the use of the property if it is not habitable.<sup>96</sup> The right to reside on then includes the right to make improvements meant to bring the dwelling to a standard suitable for human habitation so that the occupier can continue to reside on and use the property.<sup>97</sup> The occupier's right to reside on the property must be consonant with the rights contained in section 5 of ESTA, in particular, the right to human dignity. This would mean that reside in terms of ESTA relates to living in a dwelling that protects human dignity and the other fundamental rights itemised in section 5.<sup>98</sup> Arguably, an occupier cannot enjoy his or her entitlement to reside on and use a dwelling if that occupier is relocated to a dwelling that is not habitable as the dwelling might impact on his or her human dignity. In such circumstances, it is now clear that an occupier can rely on and invoke sections 5 and 6 of ESTA to resist the relocation to live in a dwelling that accords him or her habitable conditions with human dignity.<sup>99</sup> However, since not every relocation may constitute an infringement of an occupier's constitutional rights, every case will have to be dealt with according to its facts.<sup>100</sup>

*Daniels* also linked habitability to tenure security.<sup>101</sup> Security of tenure means the level of security that an occupier may possess in terms of ESTA when he or she

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(Pty) Ltd v Phasiya 2010 3 SA 152 (SCA) paras 8-9 and 22; *Mkwanazi v Bivane Bosbou (Pty) Ltd, Msimango v De Villiers; Ngema v Van der Walt; Mdletshe v Nxumalo* (LCC4/97, LCC9/97, LCC9/97, LCC10/97) [1998] ZALCC 13 (23 October 1998) SAFLII <<http://www.saflii.org/za/cases/ZALCC/1998/13.html>> para 8; *Barrie NO v Ferris* 1987 2 SA 709 (C) 714; *Tick v Broude* 1973 1 SA 462(T) 469; *Ex Parte Minister of Native Affairs* 1941 AD 53 58; *Buck v Parker* 1908 TS 1100 1104; *Beedle & Co v Bowley* (1895) 12 SC 401 403; H Mostert, JM Pienaar & J van Wyk "Land Reform" in WA Joubert & JA Faris (eds) *The Law of South Africa* 2 ed Vol 14 Part 1 (2010) para 127.

<sup>96</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-32.

<sup>97</sup> Para 32.

<sup>98</sup> Para 31.

<sup>99</sup> See *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 17. See also JM Pienaar "Land Reform" (2019) 2 *Juta's Quarterly Review of South African Law* 2.3.

<sup>100</sup> *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 18. See also JM Pienaar "Land Reform" (2019) 2 *Juta's Quarterly Review of South African Law* 2.3.

<sup>101</sup> See *Daniels v Scribante* 2017 4 SA 341 (CC) paras 32-33.

resides on and uses land belonging to another.<sup>102</sup> Security of tenure may differ depending on the purpose for which the land is used.<sup>103</sup> Marais and Muller mention that security of tenure is a specialised manifestation of human dignity in the property context.<sup>104</sup> As such, security of tenure must imply that the property should be habitable so that the occupier could reside on and use the property in dignity. Moreover, since occupiers' right to security of tenure means that the dwelling must be habitable, this, in turn, implies that the occupier is entitled to make reasonable and necessary improvements on the dwelling to ensure that the occupier has secure tenure.<sup>105</sup> Arguably, the right to access to adequate housing also means that the dwelling should be habitable, which implies that an occupier can make improvements that are reasonably necessary to ensure that such occupier resides in an adequate dwelling.<sup>106</sup> Here, habitability is read into security of tenure and adequate housing, which essentially points towards an individual standard of habitability that exists in this particular context.

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<sup>102</sup> A Mahomed, P Benjamin, B Barry, S Magardie, P Naidoo, N Yazbek, M Mokhoaetsi, J Ntuli & V Mngwengwe "Tenure Security in SA Law" in A Mohamed (ed) *Land Tenure Law* (RS: 1 2013) 2-1; A Mahomed, P Benjamin, B Barry, P Naidoo, S Magardie & N Yazbek "Tenure Security in SA Law" in A Mohamed (ed) *Understanding Land Tenure Law: Commentary and Legislation* (2009) 28 28; Pienaar *Land Reform* 384-385; L Royston "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in A Durand-Lasserve & L Royston (eds) *Holding Their Ground: Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 8 and 174; P Dhliwayo *Tenure Security in Relation to Farmland* LLM thesis, Stellenbosch University (2012) 13; P Dhliwayo "Tenure Security and Farmland: Will Recent Policy and Legislative Developments Improve the Plight of Rural Dwellers" (2014) 25 *Stellenbosch Law Review* 143 145; J Pienaar & A Kamkuemah "Farm Land and Tenure Security: New Policy and Legislative Developments" in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 282 282; J Pienaar & A Kamkuemah "Farm Land and Tenure Security: New Policy and Legislative Developments" (2011) 22 *Stellenbosch Law Review* 724 724; Rautenbach (2017) *Litnet Akademies* 959 960.

<sup>103</sup> Mahomed et al "Tenure Security in SA Law" in *Land Tenure Law* 2-1; CESCR's General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8(a).

<sup>104</sup> Marais & Muller (2018) *South African Law Journal* 774.

<sup>105</sup> See *Daniels v Scribante* 2017 4 SA 341 (CC) para 32. See also C Pienaar "Improvement of Structures by Farm Dwellers" *Stock Farm* (04-12-2017) 14-15; Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Matlala (2017) *De Rebus* 27 30.

<sup>106</sup> See *Daniels v Scribante* 2017 4 SA 341 (CC) paras 57-58. See also Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1.

The court in *Daniels* further linked habitability to human dignity.<sup>107</sup> In other words, habitability is defined in the context of occupiers with reference to human dignity under section 5(a) of ESTA, but also with reference to section 10 of the Constitution. Concerning occupiers in terms of ESTA, human dignity of occupiers cannot be limited to personal dignity.<sup>108</sup> The human dignity of occupiers must be understood to include the entitlement to a dignified standard of living despite insufficient and poor resources at the disposal of occupiers.<sup>109</sup> This means that occupiers are entitled to live on property that is habitable and conducive to human dignity.<sup>110</sup> Thus, by permitting an occupier who lives under the most deplorable circumstances to make improvements to his or her dwelling two purposes are served, namely (a) it brings the dwelling to a standard that accords with human dignity; and (b) it protects the occupier from suffering any form of indignity that might be caused by the possible departure from this standard based on intolerable living conditions in respect of the dwelling.<sup>111</sup> Therefore, the right to property is informed by the right to human dignity.<sup>112</sup> In light of the above discussion, the notion of habitability as used in case law, such as *Daniels*, is read into the right to reside, tenure security, adequate housing *and* human dignity. In a very real sense, habitability incorporates and implies all these rights that were discussed in *Daniels*.

In light of the cases of *Daniels* and *Mtenje*, it is clear that occupiers are always entitled to inhabit a dwelling that accords with human dignity and other fundamental

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<sup>107</sup> See *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-34.

<sup>108</sup> *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> para 55. See also A Sachs *The Strange Alchemy of Life and Law* (2009) 22.

<sup>109</sup> *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> para 55. See also *Daniels v Scribante* 2017 4 SA 341 (CC) para 31; BV Slade “Constitutional Property Law” (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1.

<sup>110</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-32.

<sup>111</sup> Para 34.

<sup>112</sup> Para 31. See further *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 23 and 83; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 15; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) paras 43-51; EJ Marais “Expanding the Contours of the Constitutional Property Concept” (2016) *Tydskrif vir die Suid-Afrikaanse Reg* 576 584; Marais & Muller (2018) *South African Law Journal* 774, particularly footnote 66.



rights.<sup>113</sup> This is evidently so from Madlanga J's holding in *Daniels* when he said: "The occupier's right to reside *must* be consonant with the fundamental rights contained in section 5, in particular – for present purposes – the right to human dignity".<sup>114</sup> The word "must" in the court's decision indicates that the landowner has no option, but it is mandatory for the landowner to allow the occupier to live in his or her land with human dignity.<sup>115</sup> Another interpretation could be that the dwelling should be in line with human dignity, which does not necessarily speak to who is responsible for the dwelling to be habitable, simply that it must be habitable. Furthermore, the word "must" points towards the occupiers' two equally unsatisfactory options if the land is not compatible with human dignity and other constitutional rights, namely: (a) automatic eviction – leading to homelessness - if the occupier leaves the dwelling due to intolerable living conditions; or (b) continue to reside in a property that is undignified and is not habitable for which the occupier may or may not be paying rent, depending on the agreement between the occupier and owner.<sup>116</sup> Despite the decisions of *Daniels* and *Mtenje* being unique in the sense that *Daniels* concerned improving an existing structure and *Mtenje* was about replacing tents with a new structure, at the centre of each case inquiry is the important question that should be answered, namely whether the owner has housed the occupier in a dwelling that protects the human dignity of that occupier. The occupation should not necessarily (or even primarily) be concerned with a roof over

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<sup>113</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-34; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 19.

<sup>114</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 31 (own emphasis supplied). This holding has been adopted and applied in cases like *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 19; *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 16; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> para 55; *Sandvliet Boerdery (Pty) Ltd v Mampies* 2019 6 SA 409 (SCA) para 27.

<sup>115</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-34; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 19.

<sup>116</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 32 and 52; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> paras 8-9 and 12-14, the occupier was paying monthly rent. Compare *Mpange v Sithole* 2007 6 SA 578 (W) para 1.

the occupier's head and the four walls of the dwelling; occupation for occupiers is also about ensuring that an occupier's dwelling is in line with the right to access to adequate housing (in terms of section 26(1)), the right to human dignity (in terms of section 10) and the right to security of tenure (in terms of section 25(6)). Therefore, the dwelling for occupiers should be compatible with human dignity and other fundamental rights as pointed out by Madlanga J in *Daniels*.<sup>117</sup>

While the case of *Daniels* dealt with improvements to an existing building, *Mtenje* was concerned with the building of a new structure. In principle, there is arguably no difference between improving an existing building, which includes the addition of outside paving on the one hand, and the replacement of tents with an informal structure on the other.<sup>118</sup> This is particularly so, as the existing building and the informal structure both aim to ensure better protection from the elements and to give their occupants a certain measure of dignity.<sup>119</sup> Here, human dignity means that occupiers are entitled to reside on property belonging to another under conditions that are humane and presents a dignified standard of living. This is in line with section 5(a) of ESTA, with due regard to section 10 of the Constitution. Thus, the occupier in *Daniels* was entitled to improve an existing structure to achieve a certain habitable standard and live in dignity. Likewise, it was also correct for the court in *Mtenje* to allow an occupier to erect a new structure for the same purpose of achieving a standard of habitability. This is because occupying tents that are leaking can hardly be said to be living in a habitable state and with indignity.<sup>120</sup>

In light of the above discussions, the court's finding in *Daniels* seems to endorse the premise that habitability is presumed to include the right to effect improvements that are necessary to provide an occupier with adequate housing in order to live in dignity and for the occupier to possess a certain level of security of tenure. The case of *Mtenje* following the finding in *Daniels*, goes further to hold that habitability also

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<sup>117</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-34. See also *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 19; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 49; Matlala (2017) *De Rebus* 27 30; Rautenbach (2017) *Litnet Akademies* 959 962.

<sup>118</sup> *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 34.

<sup>119</sup> Para 34.

<sup>120</sup> Para 35.

means the replacement of tents with an informal structure to provide better protection from the elements.<sup>121</sup>

In light of the above recent developments in *Daniels*, later followed with approval in *Mtenje*, before an existing structure is improved to achieve habitable and dignified living conditions and a new structure is also built to maintain a similar standard, both occasions necessitate prior meaningful engagement between the parties concerned. If the engagement gives rise to a deadlock, the courts should be approached to resolve the dispute.<sup>122</sup> Therefore, the occupier cannot rely on self-help.<sup>123</sup>

Marais and Muller in their interpretation of *Daniels* argue that the court instead of transforming the law of property and the relationship between occupiers and landowners adopted a stretched interpretation of section 5(a) of ESTA.<sup>124</sup> Such an interpretation, says Marais and Muller, may end up frustrating the spirit and objectives of the Bill of Rights in future similar cases.<sup>125</sup> I do not agree with Marais and Muller. This is simply because section 39(2) of the Constitution does not permit unduly strained interpretations of legislation as will be explained below.<sup>126</sup> In a different perspective on the *Daniels* case, Davis properly points out that Marais and Muller's interpretation of the case is misplaced, especially their argument that there was a stretched interpretation of ESTA. Davis argues that Marais and Muller's argument fails to properly explain how section 39(2) of the Constitution is inapplicable to the case of *Daniels*.<sup>127</sup> In terms of section 39(2), a court must interpret ESTA to promote the spirit and objects of the Bill of Rights.<sup>128</sup> This would mean that a court *could* adopt an

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<sup>121</sup> Para 34.

<sup>122</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 65; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 35. See further *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) para 152; *Van Rensburg v Coetzee* 1979 4 SA 655 (A) 676-678.

<sup>123</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 65; *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 35. See also *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC) para 14; *Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) paras 17-18.

<sup>124</sup> Marais & Muller (2018) *South African Law Journal* 769-770.

<sup>125</sup> 770.

<sup>126</sup> See chapter 2 part 2 3 2 above.

<sup>127</sup> Davis (2019) *South African Law Journal* 420 427-428.

<sup>128</sup> Section 39(2) of the Constitution. See further Davis (2019) *South African Law Journal* 420 428 and 431.

interpretation of ESTA that is in line with the Constitution and such an interpretation should be reasonably ascribed to section 5(a) of ESTA.<sup>129</sup> It should be noted that section 39(2) *only* requires a court interpreting legislation such as ESTA, in light of the Bill of Rights, to interpret that legislation in a manner that gives effect to the Bill of Rights' founding values such as human dignity.<sup>130</sup> Pienaar mentions that in cases like *Daniels*, what is critical is context, the purpose for which ESTA was enacted and taking into account section 39(2) of the Constitution.<sup>131</sup> Therefore, when the particular context in *Daniels*, the purpose for which ESTA was enacted and section 39(2) of the Constitution is taken into consideration, section 5(a) of ESTA must be given effect to in order to include the right asserted by Ms Daniels. This will ensure that occupiers' rights are respected and protected. More importantly, occupiers could live in conditions that do not infringe their right to human dignity.<sup>132</sup>

Davis mentions that *Daniels* is a transformative case.<sup>133</sup> I agree with Davis for the following reasons. Firstly, in *Daniels* the court upheld an occupier's right to human dignity over the owner's right to property.<sup>134</sup> This shows that all rights (even those of occupiers) are equally important and worthy of protection.<sup>135</sup> Secondly, an occupier in *Daniels* was allowed to make improvements to the dwelling to make it habitable

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<sup>129</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) paras 21-26; followed in *University of Stellenbosch Legal Aid Clinic v Minister of Justice & Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC) para 135.

<sup>130</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) paras 21-26; referred to in *Minister of Safety & Security v Sekheto* 2011 5 SA 367 (SCA) para 15; *Eskom Holdings Ltd v National Union of Mineworkers* 2012 2 SA 197 (SCA) para 28; *Daniels v Scribante* 2017 4 SA 341 (CC) para 23.

<sup>131</sup> Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 992.

<sup>132</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 23-34.

<sup>133</sup> Davis (2019) *South African Law Journal* 420 422.

<sup>134</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 31-34.

<sup>135</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 10. See further E van der Sijde "Tenure Security for ESTA occupiers: Building on the *obiter* remarks in *Baron v Claytile Limited*" (2020) 36 *South African Journal on Human Rights* 1 9-11.

without an owner's permission.<sup>136</sup> The decision in this regard indicates that ownership is not absolute as it was perceived to be before the advent of the Constitution.<sup>137</sup> Thirdly, the *right to reside* in terms of section 6(1) of ESTA was interpreted to include to reside in a habitable dwelling.<sup>138</sup> Finally, *Daniels* is a case where the notion of habitability in the context of occupiers was clearly and explicitly developed in light of the Constitution.<sup>139</sup> In the following section, the dissertation investigates the implication of the Constitution on the standard of habitability for occupiers. This is done to establish what constitutional minimum standard of habitability exists for occupiers.

### 5 3 Impact of the Constitution on the standard of habitability for occupiers

Section 25(6) of the Constitution resonates in the context of ESTA. As explained in detail in chapter 2 above, ESTA is an Act of Parliament passed to give effect to the

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<sup>136</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 59-60.

<sup>137</sup> Para 133-137. On the fact that ownership is not absolute, see generally P Dhlwayo *A Constitutional Analysis of Access Rights that Limit Landowners' Right to Exclude* LLD dissertation, Stellenbosch University (2015) 79-102 and 136; P Dhlwayo & R Dyal-Chand "Property in Law" in G Muller, R Brits, B Slade & J van Wyk (eds) *Transformative Property Law: Festschrift in Honour of AJ van der Walt* (2018) 309-312; AJ van der Walt and P Dhlwayo "The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis" (2017) 134 *South African Law Journal* 34 34-52; AJ van der Walt "Sharing servitudes" (2015) *European Property LJ* 162 200; AJ van der Walt *Property and Constitution* (2012) 29; Boggenpoel (2019) *Stellenbosch Law Review* 234 234-249; AJ van der Walt "Transformative Constitutionalism and the Development of South African Property Law (Part 2)" (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 1 2-31, the author essentially shows that the Constitution brings a shift away from absolute thinking on private common law property and hierarchical classification of rights; AJ van der Walt "Resisting Orthodoxy - Again: Thoughts on the Development of Post-Apartheid South African Law" (2002) 17 *South African Public Law* 258 277-278; AJ van der Walt "Tradition on Trial: A Critical Analysis of the Civil-law Tradition in South African Property Law" (1995) 11 *South African Journal on Human Rights* 169 175-206; AJ van der Walt & DG Kleyn "Duplex Dominium: The History and Significance of the Concept of Divided Ownership" in DP Visser (ed) *Essays on the History of Law* (1989) 213 213-260; DP Visser "The 'Absoluteness' of Ownership: The South African Common Law in Perspective" (1985) *Acta Juridica* 39 39-52; P Birks "The Roman Law Concept of Dominium and the Idea of Absolute Ownership" (1985) *Acta Juridica* 1-37.

<sup>138</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-32.

<sup>139</sup> Paras 32-34.



constitutional right enshrined in section 25(6) of the Constitution.<sup>140</sup> This provision states that any person or community whose tenure of land is legally insecure due to past racially discriminatory laws or practices is entitled to the extent provided by ESTA, to legally secure tenure or to comparable redress.<sup>141</sup> ESTA, therefore, affords occupiers with the right to secure tenure as envisaged in section 25(6) and (9) of the Constitution.<sup>142</sup> In *Baron v Claytile (Pty) Ltd* (“*Baron*”),<sup>143</sup> the court explained that for occupiers to enjoy a strong form of security of tenure as envisaged in section 25(6) of the Constitution and given effect to by ESTA, it must be acknowledged that ESTA occupiers enjoy the rights and entitlements over the land they inhabit and these rights and entitlements are as worthy of protection as those of owners.<sup>144</sup> More specifically, the view of the court in *Baron* as referred to by Pretorius AJ is further underlined by section 6(2)(a) of ESTA, which provides that:

“[w]ithout prejudice to the generality of the provisions section 5 and subsection (1), and balanced with rights of the owner or person in charge, an occupier shall have the right to security of tenure”.

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<sup>140</sup> Para 12-13. See further *Sandvliet Boerdery (Pty) Ltd v Mampies* 2019 6 SA 409 (SCA) para 14; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> paras 25-26 and 81; *Hattingh v Juta* 2013 3 SA 275 (CC) para 24; I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 561, particularly footnote 168; Rautenbach (2018) *Tydskrif vir die Suid-Afrikaanse Reg* 367 372; Rautenbach (2017) *Litnet Akademies* 959 959-960; Marais & Muller (2018) *South African Law Journal* 767 and 774; Mbhense (2014) *De Rebus* 22 23; Davis (2019) *South African Law Journal* 420 424.

<sup>141</sup> Section 25(6) of the Constitution (own emphasis).

<sup>142</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 13. See also Pienaar & Kamkuemah “Farm Land and Tenure Security” in *Law and Poverty* 282 284-285; Pienaar & Kamkuemah (2011) *Stellenbosch Law Review* 724 726-727.

<sup>143</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC).

<sup>144</sup> Para 10. See further Van der Sijde (2020) *South African Journal on Human Rights* 1 9-11; Rautenbach (2018) *Tydskrif vir die Suid-Afrikaanse Reg* 367 372; JM Pienaar “Land Reform” (2017) 3 *Juta’s Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1000; Pienaar & Kamkuemah “Farm Land and Tenure Security” in *Law and Poverty* 282 282; Pienaar & Kamkuemah (2011) *Stellenbosch Law Review* 724 724; Mahomed et al “Tenure Security in SA Law” in *Land Tenure Law* 2-1; Mahomed et al “Tenure Security in SA Law” in *Understanding Land Tenure Law* 28; Dhlwayo *Tenure Security in Relation to Farmland* LLM thesis, Stellenbosch University (2012) 13.



ESTA therefore prohibits conduct that has the impact of frustrating the exercise of rights occasioned by either an owner (or person in charge) and/or an occupier.<sup>145</sup> Section 6(2)(a) of ESTA provides occupiers with the right to security of tenure. Security of tenure is thus connected to the way in which individuals can own or occupy land and housing.<sup>146</sup> Security of tenure may differ depending on the purpose for which the land is used.<sup>147</sup> The right to tenure essentially gives occupiers a certain level of security to reside on, and use land, which they do not own.<sup>148</sup> Hence, it provides occupiers with continued occupation as balanced relative to the rights of the owner (or person in charge).<sup>149</sup>

With all this pointed out, what section 25(6) of the Constitution and ESTA aim to address is not inconceivable.<sup>150</sup> Section 25(6) of the Constitution and ESTA not only aim to provide ESTA occupiers with legally secure tenure, but they also seek to give occupiers the human dignity that they did not enjoy during the apartheid era.<sup>151</sup> In

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<sup>145</sup> The preamble of ESTA holds that “. . . the law should extend the rights of occupiers, while giving due recognition to the rights, duties and legitimate interests of owners”. See also *Daniels v Scribante* (LCC164/2015) [2015] ZALCC 13 (4 December 2015) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2015/13.html>> para 25; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> para 56.

<sup>146</sup> Mahomed et al “Tenure Security in SA Law” in *Land Tenure Law* 2-1; Mahomed et al “Tenure Security in SA Law” in *Understanding Land Tenure Law* 28; Pienaar *Land Reform* 384-385; Royston “Security of Urban Tenure in South Africa” in *Holding Their Ground* (2002) 8 and 174; Dhliwayo *Tenure Security in Relation to Farmland* 13; Dhliwayo (2014) *Stellenbosch Law Review* 143 145; Pienaar & Kamkuemah “Farm Land and Tenure Security” in *Law and Poverty* 282 282; Pienaar & Kamkuemah (2011) *Stellenbosch Law Review* 724 724; Rautenbach (2017) *Litnet Akademies* 959 960.

<sup>147</sup> Mahomed et al “Tenure Security in SA Law” in *Land Tenure Law* 2-1; CESCR’s General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (Article 11(1) of the ICESCR), UN Doc E/ 1992/23 para 8(a).

<sup>148</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 13. See also Mahomed et al “Tenure Security in SA Law” in *Land Tenure Law* 2-2.

<sup>149</sup> Mahomed et al “Tenure Security in SA Law” in *Land Tenure Law* 2-2.

<sup>150</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 23. See also *Molusi v Voges* NO 2016 3 SA 370 (CC) para 7; Davis (2019) *South African Law Journal* 420 431.

<sup>151</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 23. See further Nolan (2017) *International Journal of Constitutional Law Blog* 1/3; BV Slade “Constitutional Property Law” (2017) 2 *Juta’s Quarterly Review of South African Law* 2.1; Rautenbach (2017) *Litnet Akademies* 959 962; Davis (2018) *South African Judicial Education Journal* 25 27; Davis (2019) *South African Law*

other words, the Constitution and ESTA aim to bring security of tenure for occupiers in line with constitutional imperatives such as human dignity, equality and freedom.<sup>152</sup> As such, section 25(6) of the Constitution was enacted as a vehicle to facilitate a move away from the past by emphasising the significance of security of tenure in our new constitutional dispensation.<sup>153</sup> Furthermore, sections 25(6) was enshrined in the Constitution to rectify the indignity that was suffered by occupiers as a result of evictions or forced removals from their homes, and the relocation to land that was mostly inadequate for housing and that could not provide its occupiers with secure tenure, habitability and human dignity.<sup>154</sup>

In *Daniels*, Madlanga J properly linked security of tenure with human dignity and observed that the right to human dignity is an indispensable pivot to the right to security of tenure.<sup>155</sup> This would mean that “[t]here can be no true security of tenure under conditions devoid of human dignity.”<sup>156</sup> This is because, without human dignity, human life is substantially diminished as human dignity serves as an important foundation of the right to security of tenure and several other rights contained in the Constitution.<sup>157</sup> In this regard, the court in *Daniels* envisaged an interpretation of the right to security

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*Journal* 420 431; Bhana (2013) *South African Journal on Human Rights* 351 352; *Sandvliet Boerdery (Pty) Ltd v Mampies* 2019 6 SA 409 (SCA) para 17; *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 29; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 30.

<sup>152</sup> Pienaar & Kamkuemah “Farm Land and Tenure Security” in *Law and Poverty* 282 286-287; Pienaar & Kamkuemah (2011) *Stellenbosch Law Review* 724 728-729; Dhliwayo (2014) *Stellenbosch Law Review* 143 152.

<sup>153</sup> *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 29; referred to in *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 30.

<sup>154</sup> *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 29; cited in *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 30.

<sup>155</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 2.

<sup>156</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 2. See further Nolan (2017) *International Journal of Constitutional Law Blog* 1/3; Brickhill, Finn & Moshikaro (2017) 2 *Juta’s Quarterly Review of South African Law* 2.3.1; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 170; Hornby et al (2018) *Land* 12, especially footnote 22; Pienaar et al (2018) *South African Public Law* 1 6, particularly footnote 39; Mbhense (2014) *De Rebus* 22 23, correctly points that security of tenure is important to the enjoyment of other right such as human dignity. He then argues that an occupier’s right to human dignity is violated when an occupier does not enjoy legally secure tenure.

<sup>157</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 327; cited in *Daniels v Scribante* 2017 4 SA 341 (CC) para 2.

of tenure and human dignity to include the right to effect ordinary improvements to make the dwelling habitable and safe.<sup>158</sup> This flowed from a purposive interpretation of ESTA.<sup>159</sup> More importantly, section 25(6) and ESTA essentially set a minimum standard of habitability for occupiers. Thus, to achieve that minimum standard, the dwelling of the occupier must be habitable.

It is against this backdrop that the explored implication of the Constitution on the standard of habitability for occupiers has revealed that occupation for occupiers should be compatible with human dignity and other fundamental rights. Now that it has been established that a minimum standard of habitability exists for occupiers as informed by constitutional imperatives, the section that follows explores the question of whether the landowner or the state must ensure a level of habitability.

## **5 4 On whom does the obligation rest to ensure habitability?**

### **5 4 1 Introduction**

This section will consider whether the obligation to ensure the habitability of dwellings inhabited by occupiers rests on the landowner, the occupier, or the state. In terms of ESTA occupiers, the rights contained in chapter 2 of the Constitution impose a combination of obligations on the state and most importantly for this chapter, on owners in certain circumstances.<sup>160</sup> The Constitution provides that the state must

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<sup>158</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 31-31.

<sup>159</sup> Purposive interpretation generally means interpreting legislation or a part of legislation or a provision of the Constitution in line with or within the context of what Parliament has enacted. In the context of ESTA, a purposive interpretation would mean adopting an interpretation that best advances the noble purpose of ESTA, which in turn will provide the necessary context. The injunction of section 39(2) of the Constitution should also be noted, which seeks to promote the spirit and objectives of the Bill of rights whenever legislation is interpreted. Taking into account section 39(2) will ensure that occupiers enjoy the total and possible protection of their fundamental rights. See generally *Daniels v Scribante* 2017 4 SA 341 (CC) paras 23-24 and 57; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> paras 24-31.

<sup>160</sup> Nolan (2017) *International Journal of Constitutional Law Blog* 1/3; A Nolan "Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland" (2014) 12 *International Journal of Constitutional Law* 61 76; S Khoza *Socio-Economic Rights in South Africa: A Resource Book* (2007) 20; H Cheadle "Application" in MH Cheadle, DM Davis & NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (I: 18 2015) 3-1; Liebenberg "South Africa:

strive to “respect, protect, promote and fulfil the rights in the Bill of Rights”.<sup>161</sup> This signals that all the rights in chapter 2 of the Constitution impose both a positive and negative obligation on the state and attempts to ensure that the state does not abdicate its responsibilities.<sup>162</sup> This is because the Constitution applies to, and binds the state together with all its organs.<sup>163</sup> Arguably, this includes the obligation to ensure that a dwelling must be habitable. The Constitution further states that a right in the Bill of Rights will bind a private person “*if, and to the extent that, it is applicable*, taking into account the nature of the right and the nature of any duty imposed by the right”.<sup>164</sup> This explicitly confirms the direct application of the Bill of Rights in private relationships.<sup>165</sup> According to Nolan, the Constitution generally, but especially in section 8(2), acknowledges that the extent to which rights may impose obligations may differ in terms of how they apply to private owners.<sup>166</sup> However, the manner in which courts may exercise their discretion in respect of the application of certain obligations must be taken note of here.<sup>167</sup> As such, when a court applies the rights contained in chapter 2 of the Constitution to private landowners in terms of section 8(2), so as to give effect to a right in the Constitution, the court must apply or where necessary develop the common law to the point where legislation fails to give effect to that

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Adjudicating Social Rights under a Transformative Constitution” in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 78; Rosa *The Means and the Ends of Justice* 123; S Ellmann “A Constitutional Confluence: American ‘State Action’ Law and the Application of South Africa’s Socio-Economic Rights Guarantees to Private Actors” in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law* (2001) 444 444; Rautenbach (2017) *Litnet Akademies* 959 963.

<sup>161</sup> See section 7(2) of the Constitution.

<sup>162</sup> See chapter 2 above.

<sup>163</sup> See chapter 2 above.

<sup>164</sup> See chapter 2 above.

<sup>165</sup> See chapter 2 above.

<sup>166</sup> Nolan (2014) *International Journal of Constitutional Law* 78; Nolan (2017) *International Journal of Constitutional Law Blog* 1/3 2/3.

<sup>167</sup> Nolan (2014) *International Journal of Constitutional Law* 78; Nolan (2017) *International Journal of Constitutional Law Blog* 1/3 2/3; S Liebenberg “The Application of Socio-Economic Rights to Private Law” (2008) *Tydskrif vir die Suid-Afrikaanse Reg* 464 466; M Pieterse “Indirect Horizontal Application of the Right to Have Access to Health Care Services” (2007) 23 *South African Journal on Human Rights* 157 161; A Cockrell “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontalty’” in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (SI: 35 12015) 3A-14.

right.<sup>168</sup> Moreover, where a right in the Constitution is implicated, the court must interpret any legislation or develop the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights.<sup>169</sup> Therefore, ESTA should then be interpreted in line with the Constitution, or if necessary developed to bring it in line with the Constitution. If a court adopts an interpretation that promotes the spirit, purport and objectives of the Constitution, it affords occupiers with the necessary enjoyment and protection of their constitutional rights.<sup>170</sup> It is clear from the above discussion that the Constitution makes it possible for socio-economic rights to apply between occupiers and private owners.<sup>171</sup> Interestingly, the issue of whether socio-economic rights apply to private owners did arise in *Daniels*.<sup>172</sup> This is indicated by the subsection that follows.

#### 5 4 2 *Imposing an obligation on private landowners to ensure habitability*

##### 5 4 2 1 Obligation in terms of section 8(2)

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<sup>168</sup> Section 8(3) of the Constitution.

<sup>169</sup> See chapter 2 above.

<sup>170</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 25, citing *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53; *Sibanyoni v Holtzhausen* (LCC143/2015) [2019] ZALCC 11 (9 May 2019) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2019/11.html>> paras 31, 51 and 85.

<sup>171</sup> Liebenberg “South Africa: Adjudicating Social Rights under a Transformative Constitution” in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 78-79; S Liebenberg “The Application of Socio-Economic Rights to Private Law” (2008) *Tydskrif vir die Suid-Afrikaanse Reg* 464 464; S Liebenberg “The Interpretation of Socio-Economic Rights” in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed Vol 2 (RS: 6 2014) 33-57; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 319; P de Vos, W Freedman, D Brand, C Gevers, K Govender, P Lenaghan, D Mailula, N Ntlama, S Sibanda & L Stone “Socio-Economic Rights” in P de Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) 319-320.

<sup>172</sup> Before the *Daniels* case, the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 39-40, dealt with the issue of the imposition of socio-economic rights obligations on private actors. In *Blue Moonlight*, the court imposed a direct positive obligation on a private owner by ordering the landowner to continue to house unlawful occupiers who, if evicted, would immediately be left homeless. The case of *Blue Moonlight* was subsequently confirmed and applied in *Marialdo Tre (Pty) Ltd v Dlamini* unreported decision, referred to as (45617/2017) [2019] ZAGPJHC 299 (23 August 2019) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2019/299.html>> paras 3 and 16.



In *Daniels*, the court held that section 8(2) of the Constitution imposes a positive obligation in terms of habitability under certain circumstances on landowners to give effect to socio-economic rights and section 25(6) of the Constitution.<sup>173</sup> However, the court mentioned that an owner will bear a positive obligation *only* after a court has taken into account the following considerations: (a) the nature of the right in question; (b) the history behind the right; (c) the aim of the right; (d) the best way to achieve the intended goal of the right; (e) the potential that the right in issue can be interfered with by a private owner other than the state or its arms; and (f) whether not holding the landowner liable for infringing the right will not render the right ineffective.<sup>174</sup> Therefore, if the considerations apply to an owner, the private landowner (and not the state) may

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<sup>173</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 39-49. See further *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 32; *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 35; *Lynn v Nene* (LCC95/2016) [2018] ZALCC 21 (29 January 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/21.html>> para 61; Rautenbach (2017) *Litnet Akademies* 959 and 967; Rautenbach (2018) *Tydskrif vir die Suid-Afrikaanse Reg* 367 372-373; Nolan (2017) *International Journal of Constitutional Law Blog* 1/3; Madlanga (2018) *Stellenbosch Law Review* 372-373; Matlala (2017) *De Rebus* 27 30; B Dickson "Apex of Courts and the Development of the Common Law" in P Daly (ed) *Apex Courts and the Common Law* (2019) 36 48; Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1; Pienaar et al (2018) *South African Public Law* 1 7-8, 10 and 13; BV Slade "Constitutional Property Law" (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Morare (2017) *Land Digest* 1 1; S Rosa *The Means and the Ends of Justice: The Interaction Between Socio-Economic Rights and Administrative Justice in a South African Democratic Developmental State* LLD dissertation, Stellenbosch University (2017) 139; CESCR's General Comment No 24 (Sixty-first session, 2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, part ii para 4, particularly footnote 16.

<sup>174</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 39. See further *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 33; *Governing Body of the Juma Musjid Primary School v Essay NO* (CCT 29/10) [2011] ZACC 13 (11 April 2011) SAFLII <<http://www.saflii.org/za/cases/ZACC/2011/13.html>> paras 57-58; *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) paras 25-30; *Jooste v Botha* 2000 2 SA 199 (T) 205; Nolan (2017) *International Journal of Constitutional Law Blog* 2/3; Rautenbach (2018) *Tydskrif vir die Suid-Afrikaanse Reg* 367 373; Rautenbach (2017) *Litnet Akademies* 959 968; BV Slade "Constitutional Property Law" (2017) 2 *Juta's Quarterly Review of South African Law* 2.1, particularly footnote 11; Pienaar et al (2018) *South African Public Law* 1 8; Madlanga (2018) *Stellenbosch Law Review* 359 372.



be obliged to ensure that occupiers live in dwellings that are in a habitable condition and provide them with dignity.

It is important to note that the question of whether an owner can or should be saddled with a positive obligation to ensure habitability in the context of occupiers was arguably purely academic in *Daniels*, since Ms Daniels was willing to effect the improvements herself. Furthermore, not all the judges agreed on the extent to which an owner could be held liable to ensure the habitability of the dwelling of the occupier. The majority judgment in *Daniels* was penned by Madlanga J with Cameron J, Froneman J, Khampepe J, Musi AJ and Mbha AJ concurring. As already mentioned, the majority of the court mentioned that the Constitutional Court has not held that under no circumstances may an owner bear a positive obligation in respect of the Bill of Rights.<sup>175</sup> Whether a positive obligation can be imposed on an owner, depends on certain factors mentioned above.<sup>176</sup> In *Daniels*, the court noted that it would be appropriate in certain instances to impose a positive obligation on the owner because of the nature of the right argued by Ms Daniels and the tenuous nature of the obligation imposed by the right.<sup>177</sup> For instance, it would arguably be appropriate to impose a positive obligation on the owner if the state of disrepair of the dwelling renders useless the constitutional rights of occupiers.

In a separate concurring judgment, Froneman J pointed out that before the aspirations of the Constitution could be made a reality to everyone, including occupiers, three things had to be acknowledged. These included: (a) an honest and deep recognition of the past injustices; (b) a re-appraisal of the South African notion of ownership and property rights; and (c) an acceptance (as opposed to an avoidance) of the significance of constitutional change.<sup>178</sup> It is important to acknowledge these three things mentioned above because most white people on farms had benefited from

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<sup>175</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 48.

<sup>176</sup> Para 39.

<sup>177</sup> Paras 49 and 51.

<sup>178</sup> Para 115. See further Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 9; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 995; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 171; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1.

the social and political efforts of apartheid.<sup>179</sup> He further mentioned that the injustices of the past had to be rectified so that black and coloured people on farms could also enjoy the same socio-political benefits as white people.<sup>180</sup> This would mean that landowners should ensure that occupiers on farms do not reside on property in conditions that are inhumane and undignified to live in.<sup>181</sup> The judgment of Froneman J in this regard points towards the obligations that ordinarily come with ownership of property like ensuring that property inhabited by occupiers is habitable.

In another separate concurring judgment written by Cameron J, he cautioned judges to refrain from writing history.<sup>182</sup> This is because it is not a judge's primary competence to write on history, especially if the account of history was not complete and not directly functional to the determination of the matter at hand.<sup>183</sup> Jafta J and Nkabinde ACJ concurred with the separate judgment of Cameron. Both judges generally agreed with the main judgment and the proposed order of the court. However, the two judges did not agree with the main judgment on the issue of whether section 8(2) of the Constitution imposes a positive obligation on a private landowner to ensure that occupiers gain access and enjoy the rights enshrined in chapter 2 of the Constitution.<sup>184</sup> Despite section 8(2) indicating the possibility that the rights in the Bill

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<sup>179</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 122-125. See also Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 172; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1.

<sup>180</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 132.

<sup>181</sup> Para 132. See further Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 9; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 995; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2.

<sup>182</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 149. See further Pienaar et al (2018) *South African Public Law* 1 9; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 995; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2.

<sup>183</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 148-149. See further Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 9; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 995; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 172; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1.

<sup>184</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 156. See further Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 9

of Rights can bind owners in certain circumstances, Jafta J and Nkabinde ACJ found that section 8(2) could not be construed to impose any positive obligation on owners.<sup>185</sup> According to Jafta J and Nkabinde ACJ, Ms Daniels sought to prevent an owner from unreasonably interfering with her right to reside on the property accorded to her by ESTA.<sup>186</sup> This meant that an owner had only a negative obligation to refrain from impairing Ms Daniels' right to housing.<sup>187</sup>

Finally, Zondo J agreed with the order of the court in the main judgment. Most importantly, Zondo J noted that sections 5 and 6 of ESTA necessitate the importation of the principles of equity and fairness into the owner-occupier relationship.<sup>188</sup> As such, a just and equitable balance had to be struck between the rights of an occupier and those of an owner. This was especially so if the dispute between the owner and the occupier was that the occupier wanted to effect improvements to make the property belonging to the owner habitable without the necessary consent from the owner.<sup>189</sup> In essence, the main judgment shows that an owner can, in certain instances, bear a positive obligation in respect of the Bill of Rights to ensure that occupiers enjoy those rights. In this respect, the decision is in line with the ideology that our constitutional

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Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 995; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2.

<sup>185</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 156 and 162. See further Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 9; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 995; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2.

<sup>186</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 203.

<sup>187</sup> Paras 193-194 and 201. See further Pienaar et al (2018) *South African Public Law* 1 10; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 996; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 171; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1.

<sup>188</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 216. See further Boggenpoel (2017) 2 *Juta's Quarterly Review of South African Law* 2.1; Pienaar et al (2018) *South African Public Law* 1 10; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 997; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2.

<sup>189</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 217. See further Pienaar et al (2018) *South African Public Law* 1 10; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 997; Pienaar (2017) 2 *Juta's Quarterly Review of South African Law* 2.2; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 172; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1.

dispensation recognises that ownership of land comes with certain obligations or responsibilities.<sup>190</sup> The following subsection further shows that the obligation to ensure habitability may be informed by taking into consideration section 39(2) of the Constitution.

#### 5 4 2 2 Taking account of section 39(2)

In *Daniels*, the rights in the Bill of Rights were implicated in two ways. Firstly, Ms Daniels had the right to have her human dignity respected and protected under section 10 of the Constitution, supported by section 5 of ESTA.<sup>191</sup> Secondly, Ms Daniels had the right to security of tenure in terms of section 25(6) of the Constitution as given effect to by ESTA (section 6(2)(a)).<sup>192</sup> Jafta J in *Daniels* disagreed in terms of whether the Constitution imposes a positive obligation on a private owner to enable occupiers to gain access to and enjoy the rights guaranteed in the Bill of Rights seem to place the focus only on section 8(2) of the Constitution.<sup>193</sup> His disagreement disregards the injunction of section 39(2) of the Constitution, which requires the court to interpret

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<sup>190</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 135, citing *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23. See further *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 35; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) para 28; *Jordaan v City of Tshwane Metropolitan Municipality*; *City of Tshwane Metropolitan Municipality v New Ventures Consulting & Services (Pty) Limited*; *Ekurhuleni Metropolitan Municipality v Livanos* 2017 6 SA 287 (CC) para 51; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 34-40 and 97; *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) paras 59, 64, 102, 106, and 108-110; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) para 50; AJ van der Walt *Property and Constitution* (2012) 22; Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Boggenpoel (2019) *Stellenbosch Law Review* 234 238 and 248-249; Liebenberg "South Africa: Adjudicating Social Rights under a Transformative Constitution" in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 79; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Pienaar et al (2018) *South African Public Law* 1 13; Morare (2017) *Land Digest* 1 1; KK Noko *A Critical Analysis of the Constitutional Concept of Property in Light of the Judgment in Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC), LLM thesis, University of KwaZulu-Natal (2018) 52.

<sup>191</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 3 and 26.

<sup>192</sup> Paras 3 and 12-13.

<sup>193</sup> Paras 156-203 (per Jafta J).

ESTA through the prism of the Bill of Rights.<sup>194</sup> When ESTA is interpreted in light of the Bill of Rights, it would bring private relationships between occupiers and owners in line with the Constitution. The Constitution, therefore, regulates the relations between the owners and the occupiers. Consequently, the obligations imposed by the Constitution, in particular sections 10, 25(6) and 26 of the Constitution, must be complied with and fulfilled by private landowners,<sup>195</sup> if the nature and obligations imposed by sections 10, 25(6) and 26 applies to the private landowner.<sup>196</sup> In light of the imperatives of these sections, weighed against the need of an occupier to have his or her dwelling improved in order to achieve a standard of living that provides human dignity, it would arguably be justifiable to impose a positive obligation on the owner to ensure habitability. This would be in line with promoting the spirit, purport and objectives of the Constitution.<sup>197</sup>

According to Rautenbach, when a purposive interpretation of the Constitution is done in light of section 39(1)(a) of the Constitution, it also results in the imposition of a positive obligation on owners to give effect to socio-economic rights. This is arguably in line with the purposive value-based interpretation prescribed by the Constitution.<sup>198</sup> For example, a purposive value-based interpretation can place a positive obligation in terms of habitability on owners when a court interpreting the Bill of Rights promotes the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>199</sup> In *Daniels*, this would mean that the owner – at his own cost – could be compelled to make certain improvements to the dwelling to make it habitable and compatible with human dignity. The improvements were not luxurious items, but basic human amenities.<sup>200</sup> Where the landowner has failed in his or her

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<sup>194</sup> See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21; referred to in *Minister of Safety & Security v Sekhoto* 2011 5 SA 367 (SCA) para 15.

<sup>195</sup> Section 2 of the Constitution.

<sup>196</sup> Section 8(2).

<sup>197</sup> Section 39(2).

<sup>198</sup> Rautenbach (2017) *Litnet Akademies* 959, 964-965 and 968-969. See also *Matatiele Municipality v President of the Republic of South Africa* 2007 6 SA 477 (CC) para 36; CJ Botha *Value-Activating Constitutional Interpretation: The Embodiment of the Material Rule of Law* LLD dissertation, University of Pretoria (1991) 60-61.

<sup>199</sup> See section 39(1)(a) of the Constitution. See further *Daniels v Scribante* 2017 4 SA 341 (CC) paras 48-49; Rautenbach (2017) *Litnet Akademies* 959 959.

<sup>200</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 7.

obligation to ensure that the dwelling is habitable, according to the court in *Daniels*, an occupier who wishes to bring a dwelling to a standard that is habitable and conforms to human dignity (in terms of section 5(a) of ESTA) could, without the owner's consent, effect improvements necessary to achieve the desired standard.<sup>201</sup> If the obligation is on the owner, the occupier may arguably be able to claim back the amount for the improvements if she effected them. Whether compensation will be ordered will depend on the need of an occupier to improve his or her dwelling to a standard that provides him or her with human dignity.<sup>202</sup>

Canca AJ in the *Mtenje* judgment similarly found merit in the argument that the spirit, purport and objects of the Bill of Rights, and the provisions of section 5 of ESTA, do impose a positive obligation on landowners to ensure ESTA occupiers live in habitable dwellings and consonant with the right to human dignity.<sup>203</sup> According to the court in *Mtenje*, a purposive interpretation of the Constitution and the provisions of ESTA that would result in imposing a positive obligation on the owner meant that an occupier could not be expected to carry out the financial constraint of building a structure that complied with the title deed of the property.<sup>204</sup> However, the occupier could erect an informal structure to replace those tents that had worn out, so as to have a structure that is habitable and provides the occupier with a certain level of human dignity.<sup>205</sup> The cases of *Daniels* and *Mtenje* are not different in principle as the occupiers in both cases primarily wanted to inhabit a dwelling that is in a habitable condition and safeguard their human dignity in the process.<sup>206</sup> The cases are not clear that the responsibility to ensure that occupiers live in habitable dwellings lies with the owner. Some judges differ, some cases differ, but the argument is that the responsibility should be on the owner. The following subsection provides reasons why it is important to hold private landowners liable to ensure habitability.

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<sup>201</sup> Paras 32 and 60. See also Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 169; Brickhill, Finn & Moshikaro (2017) 2 *Juta's Quarterly Review of South African Law* 2.3.1.

<sup>202</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 51.

<sup>203</sup> *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 32.

<sup>204</sup> Para 32.

<sup>205</sup> Paras 34-35.

<sup>206</sup> Paras 34-35.



### 5 4 3 *Reasons why an obligation to ensure habitability should be imposed on private landowners*

As a starting point, for landowners to be held accountable for the habitability of dwellings for occupiers, it will depend on the considerations mentioned by the court in *Daniels*.<sup>207</sup> The owner should arguably also be held responsible to ensure habitability because he or she owns the land and all the attachments to the land. As such, ownership of land comes with certain obligations or responsibilities.<sup>208</sup> One such obligation could be ensuring that property is in a habitable state so that it may be suitable to live in.

Another reason for imposing the obligation to ensure habitability of dwellings that occupiers inhabit would be the fact that the owner is best placed to decide what happens on the land. This is basically why in *Daniels* the court ordered the occupier and the landowner to meaningfully engage with each other regarding the improvements which were necessary to ensure that the occupier lived in habitable conditions that accords with human dignity.

Moreover, the landowner could be obliged to place the dwelling in a habitable condition because when the occupier leaves, the buildings and all its attachments remain behind and essentially revert back to the possession of the owner. Furthermore, the occupier-landowner relationship is based on initial consent (express or tacit) of the owner or a right in law (ie the owner granted permission for the occupier to live and work on the farm). If the property owner or person in charge out of his own will allowed the occupier to live in his or her land, it could be argued that the property has to be liveable, in other words, habitable. A longer period of occupation and/or service by occupiers could also be an indication why a landowner may be held liable to keep the dwelling in a habitable condition.

In the final instance, where constitutional rights are implicated, the argument that property should be seen to fulfil a social function carries more weight to hold landowners liable to ensure habitability.<sup>209</sup> The social obligation of ownership means

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<sup>207</sup> See part 5 4 2 1 above.

<sup>208</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 35.

<sup>209</sup> Para 135.

that rights in property come with a share in certain responsibilities.<sup>210</sup> Thus, in instances where constitutional rights are implicated, the social obligation of property in contrast to the notion of absolute ownership has been used to argue for the limitation on the use of property by its owner and/or the imposition of an obligation on a private owner to provide others with constitutional rights.<sup>211</sup> In the constitutional dispensation, property arguably also safeguards non-property constitutional rights like human dignity and is therefore not only aimed at protecting purely economic or private interests.<sup>212</sup> The argument in favour of the social function of property is usually made where there are competing constitutional rights and/or interests of occupiers and landowners.<sup>213</sup> In those circumstances, the argument is used to reconcile and balance the interests of the owner with those of occupiers in order to promote democratic rights and human flourishing.<sup>214</sup> It should be mentioned that whether the owner may bear the obligation to ensure habitability should be decided on a case-by-case basis taking into the account the relevant circumstances of the occupier. The following subsection builds on the narrative of what can be expected of landowners.

#### *5 4 4 Obligations of a private landowner: Building on the narrative of what can be expected of owners in Baron*

The place of ownership and the obligations that ownership imposes in our constitutional dispensation is further captured by the case of *Baron*. It should be noted

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<sup>210</sup> Dhlwayo & Dyal-Chand "Property in Law" in *Transformative Property Law: Festschrift in Honour of AJ van der Walt* (2018) 309.

<sup>211</sup> 309. See further MC Mirow "The Social-Obligation Norm of Property: Duguit, Hayem and Others" (2010) 22 *Florida Journal of International Law* 191 192; GS Alexander "Pluralism and Property" (2011) 80 *Fordham Law Review* 1017 1022-1023; C Crawford "The Social Function of Property and the Human Capacity to Flourish" (2011) 80 *Fordham Law Review* 1089 1089-1134.

<sup>212</sup> AJ van der Walt *The Law of Servitudes* (2016) 41.

<sup>213</sup> Dhlwayo & Dyal-Chand "Property in Law" in *Transformative Property Law: Festschrift in Honour of AJ van der Walt* 309; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23; *Governing Body of the Juma Masjid Primary School v Essay NO* (CCT 29/10) [2011] ZACC 13 (11 April 2011) SAFLII <<http://www.saflii.org/za/cases/ZACC/2011/13.html>> para 70; Nolan (2014) *International Journal of Constitutional Law* 84.

<sup>214</sup> Dhlwayo & Dyal-Chand "Property in Law" *Transformative Property Law: Festschrift in Honour of AJ van der Walt* 309. See also Crawford (2011) *Fordham Law Review* 1089-1134.

that although the case does not deal with the habitability of a dwelling, it adds to the narrative of what can be expected of owners in relation to occupiers. In *Baron*, the occupiers were evicted from private land.<sup>215</sup> The court had to consider whether the eviction of the occupiers complied with section 10 of ESTA. More specifically, the court had to determine whether the granting of the eviction order against the occupiers was just and equitable.<sup>216</sup> The occupiers were all former workers of the brick manufacturing business on the farm. The occupiers were thus entitled to reside in housing units on the farm for the duration of their employment.<sup>217</sup> The employment of the occupiers was terminated based on misconduct on their part.<sup>218</sup> The occupiers' housing was supposed to be linked to their employment. However, the occupiers continued to reside in the housing units on the farm, although the occupiers were no longer employed by the owner for years.<sup>219</sup> The owner gave the occupiers written eviction notices to vacate the farm. However, the occupiers failed to comply with the notices and continued to reside on the farm.<sup>220</sup> As a result, the owner instituted eviction proceedings in the Magistrate's Court against the occupiers.

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<sup>215</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 1.

<sup>216</sup> Paras 2 and 4. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 999; Pienaar et al (2018) *South African Public Law* 1 11.

<sup>217</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 8. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 999; Pienaar et al (2018) *South African Public Law* 1 11; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 172.

<sup>218</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 8. See further Boggenpoel (2017) *Juta's Quarterly Review of South African Law* 2.1; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 999; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Pienaar et al (2018) *South African Public Law* 1 11; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 172.

<sup>219</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 9. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 999; Pienaar et al (2018) *South African Public Law* 1 11.

<sup>220</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 9. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 999; Pienaar et al (2018) *South African Public Law* 1 11.

After considering the interests of the occupiers and the owner, the Magistrate's Court granted the eviction order as it was just and equitable to order so in the circumstances.<sup>221</sup> The occupiers were ordered to vacate the premises for the following reasons. Firstly, the owner had housed the occupiers free of charge for too long despite the fact that the occupiers' employment had been fairly and lawfully terminated. Secondly, the owner needed the houses for its new employees as it experienced delays in production due to the late coming of the new workers. Thirdly, the new workers were sometimes absent from work due to lack of worker's accommodation on the farm. Finally, the state indicated that it would make provision for alternative housing for the occupiers.<sup>222</sup>

The order of the Magistrate's Court was sent for automatic review to the Land Claims Court. The Land Claims Court confirmed the eviction order of the Magistrate's Court.<sup>223</sup> The occupiers appealed to the Land Claims Court and the appeal was dismissed. The Land Claims Court mentioned that the constitutional obligation to ensure access to adequate housing rested solely on the state and not on private landowners.<sup>224</sup> The Land Claims Court concluded that the owner had already housed the occupiers for years, and it was supposed to be the state's responsibility to provide

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<sup>221</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 9. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 999; Pienaar et al (2018) *South African Public Law* 1 11-12; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 172.

<sup>222</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) paras 13-14. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1000; Pienaar et al (2018) *South African Public Law* 1 12.

<sup>223</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 15. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1000; Pienaar et al (2018) *South African Public Law* 1 12; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 172.

<sup>224</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 17. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1000; Pienaar et al (2018) *South African Public Law* 1 12.

housing for the occupiers.<sup>225</sup> As there was an immediate need for the owner to use the housing units to accommodate its new workers, the appeal had to fail. The occupiers made an application to the Supreme Court of Appeal for special leave to dismiss the appeal of the Land Claims Court. The Supreme Court of Appeal dismissed the application on the ground that the requirements for special leave to appeal were not met.<sup>226</sup>

The occupiers approached the Constitutional Court for relief. The issues to be considered by the Constitutional Court, amongst others, was whether a private landowner had an obligation to provide alternative accommodation to evicted occupiers.<sup>227</sup> It is important to note that the question of whether a private owner could provide suitable alternative accommodation to occupiers after an eviction in terms of ESTA was not directly at issue in *Baron* because the state was joined in the proceedings and the question of a positive obligation on the owners was eventually purely academic.<sup>228</sup> The case is nonetheless interesting because the court found that it was in the interest of justice to decide the case on the issue of alternative housing to bring about legal certainty regarding the obligations of the state and private landowners in these and similar circumstances, where occupiers have been evicted in terms of ESTA.<sup>229</sup>

The court went on to deal with the obligation of a private landowner to provide alternative housing for occupiers. It acknowledged in line with the case of *Daniels* that

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<sup>225</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 18. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1000; Pienaar et al (2018) *South African Public Law* 1 12.

<sup>226</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 22. See also Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 173.

<sup>227</sup> See *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 28. See also Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1.

<sup>228</sup> Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1.

<sup>229</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 29. See also Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1001.

ESTA can, in certain instances, place a positive obligation on a private landowner.<sup>230</sup> It should be noted that although a landowner can bear a positive obligation in terms of constitutional rights as held in *Daniels*, that does not imply that owners should carry out similar obligations as the state so that constitutional obligations may be fulfilled.<sup>231</sup> The court in *Baron* concluded that where a private owner wants to evict an occupier and there had been no breach or breakdown of the employment relationship, it would be appropriate to expect a private landowner to assist in finding alternative accommodation.<sup>232</sup> An owner could be required to provide suitable alternative accommodation to evicted occupiers.<sup>233</sup> It should be noted that imposing an obligation on the owner to provide, or help to find, suitable accommodation is a context-sensitive enquiry, with due regard to all relevant circumstances.<sup>234</sup> As such, an owner could only be excluded from liability in circumstances where there was a breach of the employment relationship. *In casu*, the employment relationship had broken down and

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<sup>230</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 31. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1001; Pienaar et al (2018) *South African Public Law* 1 13; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 173.

<sup>231</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 35. See further *Lynn v Nene* (LCC95/2016) [2018] ZALCC 21 (29 January 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/21.html>> para 61; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1001; Pienaar et al (2018) *South African Public Law* 1 13; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 173.

<sup>232</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 37. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1002; Pienaar et al (2018) *South African Public Law* 1 14; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 173.

<sup>233</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 37. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1002; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Pienaar et al (2018) *South African Public Law* 1 14; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 173.

<sup>234</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 37. See further Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1002; Pienaar et al (2018) *South African Public Law* 1 14.



the contract of employment was lawfully terminated. Consequently, the owner could no longer be saddled with an obligation to provide free housing to the occupiers.<sup>235</sup>

The court cited various cases as authority for the view that it cannot be expected of a private landowner to provide housing indefinitely to occupiers who have been legally evicted and an offer of alternative accommodation has been made by the state.<sup>236</sup> The court found that where an offer of alternative suitable accommodation had been made by the state, the occupiers cannot delay their eviction any further by stating that they find the alternative accommodation offered by the state to be unsuitable.<sup>237</sup> It is important to point out that the obligation to provide alternative suitable accommodation cannot be avoided simply by submitting reports stating that housing is not available.<sup>238</sup> As the state had offered alternative housing units to the occupiers within its available resources, the court found the accommodation to be suitable and ordered that the occupiers vacate the owner's property.<sup>239</sup>

Although the *Baron* judgment dealt with the responsibility to provide alternative accommodation in the eviction context, it is interesting in so far as it can be expected in certain instances for a landowner to accommodate occupiers on his land. This is because the *Baron* case made a principled decision on where the landowner's obligation to provide housing to occupiers should start and stop. An owner's positive obligation to provide housing for occupiers seems to start when a relationship has

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<sup>235</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 37. See also Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1.

<sup>236</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) paras 41 and 43, citing *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 40. See further Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1002; Pienaar et al (2018) *South African Public Law* 1 14; Brickhill, Finn & Moshikaro (2017) *Annual Survey of South African Law* 173.

<sup>237</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) paras 43 and 50. See also Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1003; Pienaar et al (2018) *South African Public Law* 1 14.

<sup>238</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 46. See further Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1002; Pienaar et al (2018) *South African Public Law* 1 14.

<sup>239</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 50. See further Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1; Van der Merwe & Pienaar (2017) *Annual Survey of South African Law* 1003; Pienaar (2017) 3 *Juta's Quarterly Review of South African Law* 2.2; Pienaar et al (2018) *South African Public Law* 1 15.

been legally established between the owner and occupier. The existence of a relationship impacts on a landowner's responsibility in this regard. If he fails to house an occupier, the owner could be held liable to provide housing as enjoined by the Constitution through ESTA.<sup>240</sup> *Baron* also indicates that an owner's obligation to provide housing ends when an occupier's employment or occupation has been terminated fairly and lawfully.<sup>241</sup> Furthermore, *Baron* also shows when the state should begin its obligation to provide housing to evicted occupiers, which is when the employment or occupation of the occupier has been legally terminated.<sup>242</sup>

Another interesting aspect of the *Baron* case is that it indicates the application of the Bill of Rights between private persons, and the application of the Bill of Rights between the state and private persons. According to the court, the Bill of Rights should not be applied rigidly because a rigid application sometimes leads to avoidance of addressing the real issue,<sup>243</sup> which is when it can be expected of private landowners to provide housing to evicted occupiers in the context of ESTA.<sup>244</sup> The case of *Baron* points out that in instances where it is justifiable to impose a positive obligation on the owner to provide rights, this should be done in line with the Constitution.<sup>245</sup>

#### 5 4 5 Concluding remarks

In light of the reasons given above why landowners may be liable to ensure habitability of dwelling inhabited by occupiers, I would argue that the obligation to ensure habitability should primarily rest on the landowner (and not the state). Regardless of whether an owner will be bound to ensure habitability, the enquiry should initially start with questioning whether the owner is enjoined in terms of section 25(6) of the Constitution through ESTA to accommodate the occupier. If the landowner makes the property available out of his or her own accord, the result is that a right to reside on and use the property belonging to the landowner ensues. Therefore, if the property is

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<sup>240</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 35.

<sup>241</sup> Para 14.

<sup>242</sup> Paras 35, 37-38, 40 and 46.

<sup>243</sup> Para 36. See also Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1.

<sup>244</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 36. See also Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1.

<sup>245</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 36. See also Boggenpoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1.

made available to reside on, it must equally be habitable in line with ESTA. In light of this, the primary obligation to provide a habitable dwelling should arguably rest on the landowner in certain instances, not the state. The standard for assessing whether the landowner should bear the obligation to ensure habitability is reasonableness.

The circumstances that may be taken into consideration whether the owner should be responsible to ensure habitability include the following: (a) whether the owner granted the occupier consent to reside in the dwelling; (b) the fact that the owner owns the property and that ownership of land has certain responsibilities; (c) the owner is in the best position to decide what happens on the property; (d) the social function that property should play in the new constitutional dispensation; (e) upon departure of the occupier the owner regains possession; (f) the occupier cannot be expected to carry the costs of improving the dwelling due to being poor; and (g) the financial position of the owner to build a dwelling which complies with conditions of habitability and human dignity. Here again, it should be mentioned that whether a landowner may or may not be saddled with a positive obligation to ensure habitability in the context of occupiers will depend on the circumstances of the case.

It is clear that the obligation to ensure habitability on the landowner is as a result of a balancing exercise between constitutionally protected property rights, tenure rights and/or housing rights that are necessary for the purposes of ESTA. In an instance where there are conflicting rights between parties, the Constitution also obliges the courts to recognise the injustices of the past and promote constitutional values such as human dignity, equality and freedom.<sup>246</sup> This entails taking into account rights or interests that could not legitimately stand up against ownership.<sup>247</sup> In this regard, the Constitution provides both landowners and occupiers with a right not to be subjected to arbitrary deprivation of property.<sup>248</sup> The courts recognise that there may at times be competing interests between landowners and occupiers in serious need of housing.<sup>249</sup> In such circumstances, the Constitution places an obligation on the courts to assist

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<sup>246</sup> See chapter 5 above.

<sup>247</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.

<sup>248</sup> Section 25(1) of the Constitution. This section provides that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

<sup>249</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.

occupiers who are confronted with uninhabitable conditions.<sup>250</sup> This is achieved when the courts apply the principles of equity, fairness and justice to the occupier-landowner relationship with the ultimate purpose of balancing the competing rights of occupiers and owners. For example, this may apply in a case where there is a dispute between an owner and an occupier as a result of the occupier desiring to effect improvements to the dwelling at his or her own cost to make it habitable. However, the landowner may then demand that improvements should not be effected on the basis that the owner did not permit such improvements to the dwelling, as shown in *Daniels*.<sup>251</sup> The same arguably applies where the occupier wants the owner to effect the improvements and foot the bill at the owner's cost.

Ultimately, the main principle that will make an owner shoulder the obligation to ensure habitability for occupiers is still the general requirement of section 8(2) of the Constitution, which holds that constitutional rights will bind private actors only if the right in question is applicable in the circumstances.<sup>252</sup> This should not be construed to mean that the landowner would always be responsible in the context of occupiers to ensure that the dwelling is habitable.

If it is clear that the owner cannot provide habitable housing, the courts should make a pronouncement on when the state is duty bound in this regard, for example, on the evidence that the owner has reasonably done everything he or she can, but still, there are insufficient resources at the owner's disposal to ensure habitability. It has to be noted that where constitutional rights are at stake, the state should bear the obligation to ensure habitability. It is therefore suggested that factual situations akin to those that emerged in *Daniels* should, in South African law, be approached from the perspective of a purposive value-based interpretation in terms of section 39(2) of the Constitution.<sup>253</sup> This would entail that, if Ms Daniels did not (or could not) make the improvements, the court should compel the landowner to carry the cost of improvements to make the dwelling fit for human habitation and not constitute an infringement of Ms Daniels's right to human dignity. In this regard, it would not be inappropriate or unreasonable to compel the owner as the improvements were basic

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<sup>250</sup> Compare *Mpange v Sithole* 2007 6 SA 578 (W) paras 1 and 54.

<sup>251</sup> See *Daniels v Scribante* 2017 4 SA 341 (CC).

<sup>252</sup> See chapter 2 and 5 above.

<sup>253</sup> See chapter 2 and 5 above.

human amenities and the landowner conceded that the dwelling did not accord Ms Daniels with the necessary human dignity.

## 5.5 Conclusion

Habitability for occupiers is not defined in ESTA. The case of *Daniels* has defined habitability for occupiers. In this context, habitability was defined to mean the right to reside on and use a dwelling belonging to another. Furthermore, habitability was said to imply a certain level of security of tenure. Habitability was defined to include the right to make improvements, reasonably necessary, to bring a dwelling to a standard befitting human dignity.<sup>254</sup> This constitutes an individual standard of habitability for occupiers in this context, and it is a welcome milestone for the protection of occupiers' rights in South Africa. The Constitution directly gave the result of the existing standard of habitability for occupiers in *Daniels*. The impact of the Constitution on the standard of habitability indicates that the right of an occupier to reside on another's property must be consonant with other fundamental rights contained in the Constitution and ESTA, but as the *Daniels* case shows, human dignity in particular.<sup>255</sup> More importantly, the impact of the Constitution on the standard of habitability shows that, for occupiers, it is about adequate housing that provides security of tenure, habitability and protects human dignity.<sup>256</sup> The link between these rights implies a constitutional minimum standard of habitability for occupiers derived from the Constitution and given effect to by ESTA. This link forms what would be constitutional imperatives that occupiers can rely on to hold landowners liable for failure or neglect to maintain a dwelling in a habitable condition.

The obligation to ensure habitability is further informed by constitutional imperatives, but this time, guided by the constitutional provisions of sections 8(2) and 39(2) of the Constitution. This will give the right bearer the necessary protection to enjoy access to socio-economic resources and basic amenities necessitated by social rights.<sup>257</sup> The enquiry of whether the landowner or the state will bear a positive obligation to ensure habitability for occupiers is further guided by the following factors.

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<sup>254</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 32.

<sup>255</sup> Para 31.

<sup>256</sup> Paras 31-34.

<sup>257</sup> See chapter 2 above.

These factors include the nature of the right; the historical background of the right; the purpose of the right and the best way to achieve that purpose; the possibility that the right can be impaired by a private person other than the state; and whether by imposing a positive obligation on the private landowner it will result in affecting the essential core entitlements that are attached to the right at hand.<sup>258</sup>

The other reasons for why an obligation to ensure habitability may potentially rest on the owner include the social function that property plays in the constitutional dispensation, the existence of a right of residence, the owner owns the land and therefore has the power to decide what happens with the property, and the owner's right to possession is temporarily limited until the occupiers vacate the land. These reasons will serve as an appropriate manner to reconcile and balance the owner's interests with those of occupiers so that democratic rights may be promoted.<sup>259</sup> More importantly, the above-mentioned reasons may ensure that the quality of life of occupiers is taken into account and will enable the position of occupiers to be subject to substantial improvement. It can therefore be said that the obligation to ensure habitability for occupiers depends on the facts of each case.

It has become clearer that the Constitutional Court is more willing to take vigorous strides to protect constitutional rights.<sup>260</sup> This is evident from the *Daniels* case, which gave effect to the right to security of tenure and human dignity. In terms of the scope and nature of the right to security of tenure, the Constitutional Court adopted a purposive interpretation of security of tenure as envisaged by the Constitution and given effect to by ESTA.<sup>261</sup> The court found that an occupiers' right to security of tenure means that the dwelling must be habitable, which in turn implies that the occupier is entitled to make reasonable and necessary improvements on the dwelling to ensure its habitability without the owner's consent.<sup>262</sup> The court further mentioned that ESTA could, in certain circumstances, impose a positive obligation on the owner to ensure

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<sup>258</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 39.

<sup>259</sup> Dhlwayo & R Dyal-Chand "Property in Law" in *Transformative Property Law: Festschrift in Honour of AJ van der Walt* 309.

<sup>260</sup> CM van Heerden & A Boraine "Reading Procedure and Substance into the Basic Right to Security of Tenure" (2006) 39 *De Jure* 319 351.

<sup>261</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 23-24.

<sup>262</sup> Para 32.



that occupiers have secure tenure.<sup>263</sup> The standard of whether or not to place a positive obligation on a private landowner is reasonableness. Where the obligation requires the owner to spend money unreasonably, the state should be called upon to assist occupiers.<sup>264</sup>

Nevertheless, it is submitted that the case of *Daniels* is context specific.<sup>265</sup> Thus, the attempt of the court to afford occupiers the security of tenure and human dignity that eluded most of them throughout the colonial and apartheid regimes, through adopting an interpretation that best advances the noble purpose of section 25(6) and ESTA, should not be seen as a blanket application to future cases. The question that arises is how the protection given to Ms Daniels can or should be given by courts in future cases, especially where the occupier requires the owner to be the one who must bring the dwelling to a habitable standard at the owner's cost. The Land Claims Court<sup>266</sup> and the Supreme Court of Appeal<sup>267</sup> have taken a similar stance as the Constitutional Court in light of the dignity *ratio* in *Daniels*. These courts applied the case of *Daniels* and held that an occupier's right to reside on and use a dwelling belonging to another entitles occupiers to live on the property of the owner with human dignity.<sup>268</sup>

Although the Constitutional Court may have had one particular occupier in mind, namely those that can effect the basic improvements at their own cost, it is apparent that the *Daniels* case does have implications for occupiers who may require the owner to bear the costs of improvements. This is so, as it does not discriminate or exclude between the right of security of tenure and human dignity enjoyed by an occupier who can in fact make improvements and the one who may need the owner to carry out improvements. It must be emphasised here again, as the court pointed out in *Daniels*, that an owner's consent is not a requirement for an occupier to exercise his or her right to make necessary reasonable improvements to the dwelling, but the occupier and the

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<sup>263</sup> Paras 49 and 39.

<sup>264</sup> Para 40.

<sup>265</sup> Boggendoel (2017) 3 *Juta's Quarterly Review of South African Law* 2.1.

<sup>266</sup> See *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> paras 18-19 and 32-38.

<sup>267</sup> See *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) paras 15-18.

<sup>268</sup> *Erasmus v Mtenje* (LCC 202/2017) [2018] ZALCC 12 (12 June 2018) SAFLII <<http://www.saflii.org/za/cases/ZALCC/2018/12.html>> para 19; *Oranje v Rouxlandia Investments (Pty) Ltd* 2019 3 SA 108 (SCA) para 16.

owner must meaningfully engage with each other regarding the improvements to be effected in order to avoid frustrating the rights enjoyed by either the owner or the occupier.<sup>269</sup>

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<sup>269</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 61-65.

## CHAPTER 6: CONCLUSION – TOWARDS A COMMON (OR MINIMUM) STANDARD OF HABITABILITY?

### 6 1 Introduction

The habitability of dwellings rented, occupied with permission from the owner, or in terms of a right in law is important. Broadly speaking, this is because a dwelling can arguably not be useful to an occupant if it is not habitable. It is important to note that not only is the dwelling not useful to the inhabitant, but to provide occupants with uninhabitable dwellings does not comply with South African law. Establishing an adequate and sufficient definition of habitability in the context where one person occupies the property of another is therefore crucial. What do we mean when we say that a dwelling must be habitable, and more importantly, according to what standard do we measure this notion of habitability? Clearly, on a basic level, a dwelling has to be properly looked after, presumably by the owner, to ensure that it is habitable. Property owners, as apparent from the decisions in *Mpange v Sithole* (“*Mpange*”)<sup>1</sup> and *Daniels v Scribante* (“*Daniels*”),<sup>2</sup> have consistently and deliberately neglected or refused to provide tenants and occupiers with dwellings that comply with what the court has termed “habitability”. The denial of dwellings that comply with habitability to these type of inhabitants seems to be based on the common law (for instance in the context of tenants and usufructuaries) and legislation (in the context of occupiers). The common law (regulating tenants and usufructuaries) and legislation (regulating occupiers) do not recognise that the right to live in a habitable dwelling could legitimately stand up against ownership. The common law and legislation in the respective contexts primarily recognised the right of ownership to be at the pinnacle of all rights, interests and/or entitlements and as such, the property owner could do as he or she pleases with his or her property. If the dwelling is not habitable, the inhabitant can either continue to stay in the premises or choose to vacate the dwelling due to the property being in an unacceptable condition. It is therefore unsurprising to see that when the above-mentioned cases came before the courts, the necessity to protect the tenants’ and occupiers’ right to a habitable dwelling while occupying property belonging to another was clear. It was these cases, namely *Mpange* and *Daniels* that

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<sup>1</sup> *Mpange v Sithole* 2007 6 SA 578 (W).

<sup>2</sup> *Daniels v Scribante* 2017 4 SA 341 (CC).

initially sparked the interest in this dissertation. It is still not clear what would constitute a “habitable” dwelling, especially regarding the question of whether different contexts would necessitate different meanings of habitability. Would a dwelling be habitable in one context and fail to comply with habitability in another? Or should there be a common standard that should determine that *all* dwellings made available to another by an owner for residential purposes comply with a basic level of habitability? More importantly, it is necessary to provide clarity on a particular minimum standard for the type of inhabitants in *Mpange* and *Daniels*, but also other contexts where owners make their dwellings available to others for residential purposes. To answer these questions, it was necessary to assess three categories of inhabitants in which the question of a minimum or common standard of habitability potentially arises. To achieve this goal, the dissertation is divided into six chapters.

Chapter 1 sets out the research aims that are addressed by the dissertation. The first aim of the dissertation is to provide a comparison between tenants, usufructuaries and occupiers in South Africa as categories of inhabitants that occupy property belonging to another. The second aim is to determine whether a common or more importantly, a minimum, standard of habitability exists for tenants, usufructuaries and occupiers in South African law. The third aim is to consider whether a common standard of habitability for tenants, usufructuaries and occupiers in South African law can be derived from the Constitution of the Republic of South Africa, 1996 (“Constitution”). In the fourth place, the dissertation aims to investigate whether the obligation to ensure habitability for tenants, usufructuaries and occupiers rests on the owner of the property, or the state, or even the actual inhabitant of the property. Finally, if a minimum standard of habitability is not present in one (or all) of these categories of inhabitants, the goal is to determine whether the absence of a minimum standard of habitability is (un)constitutional. If unconstitutionality exists because a particular category of inhabitant does not comply with a minimum standard of habitability, it is necessary to determine the best approach for South African law to the habitability of dwellings in that particular category. The following sections of chapter 6 evaluate the outcomes of these research aims.

## 6 2 Conclusions from each chapter dealing with the categories of comparison

### 6 2 1 Introduction

In light of the literature and case law concerning habitability of dwellings discussed in chapters 3, 4 and 5 of the dissertation, it is clear that no *common* standard of habitability exists across the categories of tenants, usufructuaries and occupiers in South African law.<sup>3</sup> This is because these inhabitants are not entirely the same and the underlying relationship in each context is regulated by different principles and sources of law such as the common law as opposed to legislation, which cannot wholesale be transplanted from one category of inhabitant to another. However, a closer analysis of these type of inhabitants clearly indicates that, at the very least, a *minimum* standard of habitability exists in all three categories. This minimum standard is present on the basis of the common law (in terms of tenants and usufructuaries) and legislation (in the context of tenants and occupiers) in South African law. Thus, the existing minimum standard as pronounced in case law (for example in the context of tenants and occupiers) and stipulated in a statute (for instance in the case of tenants) is an appropriate approach to habitability in that category of inhabitants. There are, however, particular nuances between the categories that will be highlighted below.

### 6 2 2 Conclusions relating to tenants

For tenants, habitability is essentially based on the common-law requirement that the property to be let must be in a condition that is reasonably fit for the purpose for which the dwelling was hired. It should be mentioned that the courts in any event in a number of cases applied habitability even though it was not a specific requirement. In this regard, reference to habitability was essentially an extension of the common-law fit for the purpose requirement. Tenants could use this standard to hold the landowner responsible to place the dwelling leased in a condition reasonably fit for use unless specifically excluded in the lease contract. In terms of the RHA, habitability means that the dwelling must be in acceptable living conditions.<sup>4</sup> In essence, the dwelling in terms

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<sup>3</sup> For a similar view, see also Z Boggenpoel & B Slade “Where Is Property? Some Thoughts on the Theoretical Implications of *Daniels v Scribante*” (2020) 10 *Constitutional Court Review* 379 391.

<sup>4</sup> See section 13(4) of the RHA.

of the RHA must be fit and suitable for human habitation, which reinforces the common-law requirement of fit for the purpose. In this respect, the common law and the RHA arguably point towards a minimum standard of habitability in the context of tenants. However, once the RHAA comes into effect, the common-law position and the RHA as it relates to property rented will be changed or amended from the “fit for the purpose” requirement specifically to the requirement of “habitability”.<sup>5</sup> Therefore, a dwelling will be habitable if at the commencement of the lease the dwelling is safe and suitable to live in, which includes a structurally sound building with adequate space that protects tenants from weather elements, threats to health, and provides the tenants, the tenants’ household and visitors with physical safety.<sup>6</sup>

The introduction of a minimum standard of habitability for tenants in the RHAA is a welcome improvement in the rental housing industry. This is because it will put landowners and tenants on notice regarding the condition of the property, especially on what the property should look like when the landowner hands it over to the tenant. If the property does not display the necessary standard as set out in the RHAA, tenants will have the power to bargain for habitable dwellings before the commencement of the lease. This will give tenants more protection against unscrupulous landowners and the tenants will not be confronted with a residence that is unsafe, undignified and a building that is inadequate to live in. Given the authority that courts or tribunals will now have due to the express and deliberate inclusion of a standard of habitability in the RHAA, and the fact that the standard for tenants is limited to the physical condition for which the property is rented in terms of the RHAA, there is a possibility that when courts or tribunals interpret habitability under the RHAA the courts or tribunals may include other elements to the existing standard.<sup>7</sup> This will ensure that other parts of the property that go beyond the physical condition of the property, like plumbing, gutters and the outside part of the property, which are necessary for the dwelling to be habitable, are also covered. This will arguably provide even better protection for tenants when it comes to the habitability of the dwelling.

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<sup>5</sup> See chapter 3 above.

<sup>6</sup> See section 1 of the RHAA.

<sup>7</sup> See S Viljoen *The Law of Landlord and Tenant* (2016) 200.



It is clear that the obligation to ensure habitability for tenants rests on the private landowner and not the state or the tenants.<sup>8</sup> According to the common-law standard, this means that when a tenant enters into a lease agreement, the landowner must place and maintain the dwelling in a condition reasonably *fit for the purpose* for which it was let.<sup>9</sup> The RHA confirms the common-law obligation by requiring the owner to handover and maintain the property leased in acceptable living conditions to ensure that the tenants have reasonable use.<sup>10</sup> As mentioned already, the common law and the RHA obligation of fit for the purpose will be replaced with habitability once the RHAA is signed into law. In this regard, an owner will specifically be obliged in terms of the RHAA to provide tenants with a dwelling that is in a habitable condition.<sup>11</sup> In this context, habitable condition means that the dwelling must have adequate space, protection from the elements and threats to health, physical safety and the dwelling must be sound in terms of its physical structure.<sup>12</sup> The owner also has the obligation to maintain the existing structure of the dwelling in the same condition for the duration of the lease.<sup>13</sup> In this context, maintain means to effect repairs that may be necessary to ensure that the dwelling is kept in a habitable condition.<sup>14</sup> This will provide greater protection to tenants in that the landowner will expressly warrant that the dwelling is habitable. This means that the property will be safe and suitable for tenants to inhabit. If it is not habitable, the tenant will have recourse to the courts and/or tribunals as the courts or tribunals have more authority to deal with landowners who fail or neglect to place and maintain the property in a proper and habitable condition. Tenants will no longer reside on property that is in an unacceptable condition due to their lack of bargaining power or fear of being left homeless if they do not accept the property as it is. In this regard, the RHAA is assuring in terms of protecting the interests of tenants and ensuring that tenants live in habitable conditions. Arguably, the RHAA confirms the minimum standard of habitability in this context.

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<sup>8</sup> See chapter 3 above.

<sup>9</sup> See chapter 3 above.

<sup>10</sup> See Section 13(4) of the RHA.

<sup>11</sup> See section 4B(11) of the RHAA.

<sup>12</sup> See section 1 of the RHAA.

<sup>13</sup> See section 4B(11) of the RHAA.

<sup>14</sup> See section 1 of the RHAA.

### 6 2 3 *Conclusions relating to usufructuaries*

There is no clear definition of habitability of dwellings in the context of usufructuaries in South African law.<sup>15</sup> Therefore, we turn to define habitability in the sense of what can be crystallised from the interpretation of the common law regarding the fact that the dwelling should be fit for human habitation. In this context, *fit for human habitation* means that property subject to a usufruct must be suitable for human beings to live in and should be free from defects.<sup>16</sup> Habitability in the sense of fit for human habitation has been pronounced in case law to mean that the dwelling of a usufruct must be placed in a habitable state of repair. In this context, *habitable state of repair* suggests that the usufruct dwelling must be in a safe, liveable and good condition for the duration of the usufruct.<sup>17</sup> Habitability in the context of the usufructuary relationship further implies allowing the usufructuary, with the leave of the court, to effect necessary repairs for the benefit of the property. Furthermore, it includes providing the usufructuary with accessories that are necessary to live in the dwelling more comfortably or accessories that make the property more convenient to use.<sup>18</sup> Given the reason why a usufruct is granted, such a minimum standard of habitability is reasonable. It ensures that the bequest contained in the testator's will does not end prematurely. More importantly, the property remains in good condition in the interest of the usufructuary and the heirs.<sup>19</sup> In this regard, the common-law construct of a usufruct is presumably in line with the Constitution. This is because the usufructuary can live in adequate housing that will provide him or her with security of tenure and human dignity. However, if the common law is applied rigidly and no allowance is made to make improvements aimed at preserving the dwelling in a habitable state, the common law may need to be developed. The development of the common law would be necessary to ensure that a dwelling is habitable in instances where the court unreasonably refuses to lift a restraint in the will so that money is raised to make necessary improvements in order to ensure the habitability of the dwelling.

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<sup>15</sup> See chapter 4 part 4 2 above.

<sup>16</sup> See chapter 4 part 4 2 above.

<sup>17</sup> See chapter 4 part 4 2 above.

<sup>18</sup> See chapter 4 part 4 2 above.

<sup>19</sup> *Ex Parte De Douallier* (1907) 24 SC 282 283.

The obligation to ensure that the property subject to a usufruct is in a habitable state of repair in the context of usufructuaries primarily rests on the owner.<sup>20</sup> Therefore, an owner who grants a usufruct must ensure that the dwelling is placed in a liveable condition and that the dwelling is maintained in good repair. In this context, *maintain in good repair* means keeping the property in a reasonable condition and includes such repairs that are necessary to ensure that the dwelling is fit for human habitation. When the property is in good repair and maintained according to the same standard, it will ensure that the usufructuary uses the property for his or her comfort and can enjoy benefits arising from the property. In this context, *use and enjoyment* mean the entitlement to use the property subject to a usufruct and acquire fruits that can be derived from the continued existence of the dwelling. Thus, for the usufructuary to enjoy the usufruct and reap benefits as well, the property must be placed in a habitable state of repair by the owner. This will ensure that the dwelling remains useful to the usufructuary and in line with South African law in terms of the standard required for residential premises. In the context of usufructuaries, the minimum standard of habitability is not clearly and explicitly stated. However, notions such as “fit for human habitation”, “use and enjoyment of the usufruct” and “maintained in good repair”, arguably point towards a possible minimum standard of habitability for usufructuaries.

#### 6 2 4 Conclusions relating to occupiers

The minimum standard of habitability of dwellings inhabited by occupiers is focused on the notion of “reside on” in terms of section 6(1) of ESTA as seen in *Daniels*.<sup>21</sup> Thus, the fact that an occupier *resides on* and *uses* the property of the owner implies, at the very least, that the dwelling should be habitable.<sup>22</sup> This is by far the category of inhabitant where the notion was developed very clearly and explicitly relying on the Constitution. It is clear in this context that the notion of habitability includes making improvements without the landowner’s consent that are reasonably necessary to ensure that the dwelling is habitable.<sup>23</sup> This is a major milestone for South African law in the context of occupiers in terms of ESTA, especially when one reflects on the living

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<sup>20</sup> See chapter 4 part 4 4 above.

<sup>21</sup> See chapter 5 part 5 2 above.

<sup>22</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 32.

<sup>23</sup> Paras 32 and 59-65.

conditions of occupiers who live on farms. The conditions of dwellings on certain farms do not always meet a standard of habitability that can be described as dignified for purposes of section 10 of the Constitution and reinforced by section 5(a) of ESTA.<sup>24</sup> Consequently, the above-mentioned standard of habitability as developed in *Daniels* will arguably bring about uniformity in terms of the living conditions on farms. There is no doubt that in light of *Daniels* more protection will be granted to occupiers in terms of the dwellings that they occupy. More crucially, an existing minimum standard for occupiers has now been established and the debates relating to whether a minimum standard exists or not has essentially been laid to rest.

I would argue that there is still an avenue for courts to extend the standard of habitability in future cases as the existing standard is presumably only limited to the physical condition of the dwelling and reasonably necessary improvements. There is a possibility that in future the courts may include useful improvements to the existing standard. This is because what is useful is sometimes necessary for the occupier to live in acceptable conditions. A big question that potentially remains unanswered after this dissertation is, should the notion of habitability of dwellings for occupiers encompass internal and external factors? Should habitability be about ensuring that the dwellings of occupiers are accessible and close to amenities? Habitability could in future be possibly read into accessibility and closeness of the dwelling to basic amenities if these are necessary for occupiers to live in habitable conditions and with human dignity. It should be mentioned that it is currently not done in this way.

As I argued in chapter 5, it is clear that the obligation to ensure habitability should rest on the owner concerning occupiers in terms of ESTA.<sup>25</sup> According to the *Daniels* case, the Constitution and ESTA (in terms of section 25(6)) do not bar a court from imposing a positive obligation in respect of habitability for occupiers on a private landowner. Whether or not an owner will be bound to ensure habitability will depend on whether the right in question is applied to private landowners.<sup>26</sup> The source of the owner's obligation is the constitutional provision of section 8(2), dealing with the application,<sup>27</sup> and section 39(2) concerning the interpretation of rights.<sup>28</sup> Furthermore,

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<sup>24</sup> Para 111.

<sup>25</sup> See chapter 5 part 5.4.4 above.

<sup>26</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 38.

<sup>27</sup> Paras 38-47.

<sup>28</sup> Paras 23-25.

whether an owner is bound will depend on the following factors, namely the nature of the right; the historical background of the right; the purpose of the right and how the purpose of the right can best be achieved; the possibility that the right may be infringed by a private landowner; and whether failure to hold the private landowner accountable for infringing the right will impact on the essential entitlements of the right.<sup>29</sup>

Moreover, the landowner could arguably be saddled with the responsibility to ensure habitability based on the following observations, namely the owner granted the occupier permission to live and/or work on the farm; the owner owns the property and all the attachments thereto; the owner is in a position to decide what happens on the property; when the occupier's right of residence is legally terminated, the property and all the attachments remain behind and possession is essentially restored to the owner; the significance of promoting the social function of property; and the occupier is not in a position to cover the costs of improving the dwelling. It should also be emphasised here that the main provision for holding the landowner liable to ensure habitability is section 8(2) of the Constitution, which provides for the Bill of Rights to apply to a private landowner, only where the nature of the right and the nature of the duty allows it to be binding on private persons.<sup>30</sup> In this regard, if that provision applies to an owner who is enjoined by section 25(6) of the Constitution through ESTA to house occupiers, the owner must ensure that the dwelling is habitable so that the occupier can reside on and use the dwelling.<sup>31</sup>

The application of the Bill of Rights between occupiers and private landowners has not yet played out fully in practice.<sup>32</sup> This is evident from the judgment penned by Jafta J in *Daniels* who pointed out that he does not read section 8(2) of the Constitution as being a source of any obligation.<sup>33</sup> According to Jafta J, the Bill of Rights is enforceable against the state and private owners, but the reading of section 8(2) does not suggest that a positive obligation (in terms of habitability for occupiers) may be imposed on a

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<sup>29</sup> Para 39.

<sup>30</sup> Paras 38-41.

<sup>31</sup> Paras 32 and 49.

<sup>32</sup> For a similar view, see A Nolan "Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland" (2014) 12 *International Journal of Constitutional Law* 61 63; A Nolan "Daniels v Scribante: South Africa Pushes the Boundaries for Horizontality and Social Rights" (2017) *International Journal of Constitutional Law Blog* 1/3 3/3.

<sup>33</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 156.

private person.<sup>34</sup> It will be interesting to see how courts will deal with future cases on the obligation to ensure habitability in the context of occupiers. For instance, if the rights in the Bill of Rights can never be provided by a private owner, the question that arises is what will happen to occupiers who do not have money to carry the cost of improvements. Should the state be tasked with the responsibility of providing a dwelling that is habitable in the case where the owner neglects to do so, and the occupier does not have the means to upgrade the dwelling?

It is submitted that it would not be appropriate for the court to impute neglect or refusal to maintain a dwelling on the part of the landowner on the state. The state (in terms of section 25(5)) has enjoined private owners in terms of section 25(6) of the Constitution through ESTA to accommodate an occupier on the owners' land. If the occupier is an occupant of the dwelling with rights protected under ESTA and who had express or tacit authority to reside on the property, the occupier's right to reside on the property is therefore valid. Accordingly, the owner must provide the occupier with a habitable dwelling. The landowner should also maintain the dwelling in the same standard until the right to reside on the property is legally terminated. Consequently, the owner should be held liable to ensure the habitability of the dwelling. However, the situation of occupiers is unclear, and it will have to be dealt with on a case by case basis. Having observed that, it seems that in the categories of comparison, the obligation to ensure habitability more clearly rests on the owner of the property (in the context of tenants and usufructuaries) and the landowner only in certain circumstances (for instance in the occupier context). This may have implications as one reflects on a common standard of habitability. Thus, the fact that the owner is responsible for the habitability of the dwelling only in the context of tenants and usufructuaries but not clearly responsible in the context of occupiers points towards the fact that there is currently no common standard of ensuring habitability.<sup>35</sup> This is because the categories of comparison are not the same when it comes to the obligation to ensure habitability.

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<sup>34</sup> Paras 156-157.

<sup>35</sup> See also Z Boggendoel & B Slade "Where Is Property? Some Thoughts on the Theoretical Implications of *Daniels v Scribante*" (2020) 10 *Constitutional Court Review* 379 391.



### 6 3 Habitability and the Constitution

The fact that an owner is obliged to ensure habitability in terms of the common law or legislation in the respective categories of inhabitants may arguably not be enough to provide for a common standard of habitability.<sup>36</sup> A minimum standard of habitability between tenants, usufructuaries and occupiers in South African law is evidently essential. This is because the Constitution requires everyone including the categories of comparison to live in an environment that is safe and healthy.<sup>37</sup> Thus, if the Constitution applies to all forms of habitation (including all the categories of inhabitants under discussion in this dissertation), that would justify some minimum standard in all instances. That is, of course, presuming that the Constitution is in fact applicable in all cases. It has certainly not been applied in all three categories of comparison, but that does not mean the Constitution is not applicable as was argued in this dissertation.

The Constitution should arguably apply in the context of all types of inhabitants so that, at the very least, there is a standard of habitability that should be complied with. Although the standard may vary in each category, there should be a threshold. For the threshold standard to work, habitability on its own – as a stand-alone concept – may be difficult to maintain if it is not linked to the Constitution to determine a common (or, perhaps more appropriate, minimum) standard. Thus, for a minimum standard of habitability to have a practical effect, it may require habitability to be linked with constitutional rights, such as human dignity (section 10), access to adequate housing (section 26) and/or security of tenure (section 25(6)) to potentially have applicability in *all* three categories of occupation.<sup>38</sup> This is because the rights to access to adequate housing, human dignity and/or security of tenure are interrelated and interdependent and to a large extent should inform the baseline standard for habitability.<sup>39</sup> As such, the Constitution requires that when dealing with these rights the values of human dignity, freedom and equality should be promoted.<sup>40</sup> Respect for these foundational

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<sup>36</sup> See also Z Boggempoel & B Slade “Where Is Property? Some Thoughts on the Theoretical Implications of *Daniels v Scribante*” (2020) 10 *Constitutional Court Review* 379 391.

<sup>37</sup> See section 152(1)(d) of the Constitution.

<sup>38</sup> G Budlender “Towards a Right to Housing” in AJ van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 52.

<sup>39</sup> See chapter 3 part 3 3, chapter 4 part 4 4 and chapter 5 part 5 3 above. See further *Daniels v Scribante* 2017 4 SA 341 (CC) paras 2 and 12; JM Pienaar, E Johnson, W du Plessis & N Olivier “Land Matters: 2017 (2)” (2018) 33 *South African Public Law* 1 6.

<sup>40</sup> See section 39(1)(a) of the Constitution.

values, more especially human dignity, can be a guide towards a standard of habitability. This is because both the right to access to adequate housing and the right to security of tenure cannot be separated from the right or value of human dignity.<sup>41</sup> This means that a standard that is different in each category of inhabitant may be inappropriate; a common standard may need to be pronounced to give effect to the rights and values in the Constitution.

The question that emerges is whether there can be a minimum (or common) standard. Arguably, there can be an individual standard as established in chapters 3, 4 and 5 of the dissertation but not a common standard as the meaning of habitability in each category may differ.<sup>42</sup> This is because each category of comparison is so legally disparate that requiring a common standard will not work in all three contexts. However, as was argued in this dissertation, the Constitution forms the baseline standard that eventually establishes a common element that will be required for dwellings in all three categories. As observed in chapters 3, 4 and 5 above, each category has different approaches to the sources of law and their remedial options. As such, the manner in which a remedy is sought by tenants, usufructuaries and occupiers is characterised by complexity and makes it difficult for exactly the same standard to be sustained for all three inhabitants.

Chapter 3 showed that a minimum standard of habitability for tenants can be derived from the Constitution. Similarly, chapter 5 discovered that a minimum standard of habitability for occupiers can also be derived from the Constitution. In the context of usufructuaries, such a minimum standard of habitability for usufructuaries has not yet been derived from the Constitution. This is because the need to derive a minimum standard from the Constitution has not pertinently arisen in case law as usufructuaries do not ordinarily rely on their constitutional rights to bring the usufruct dwelling into a habitable state of repair. Instead, usufructuaries directly rely on the common law to argue that the dwelling is not habitable. It is the common law that will prescribe the position and outcome of the case at hand. Nonetheless, it was argued that a usufructuary should be able to rely on the Constitution, particularly the right to human dignity or access to adequate housing or security of tenure, to petition that the usufruct

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<sup>41</sup> See chapter 2 part 2 3 above. See further A Sachs *The Strange Alchemy of Life and Law* (2009) 179.

<sup>42</sup> See also Z Boggempoel & B Slade "Where Is Property? Some Thoughts on the Theoretical Implications of *Daniels v Scribante*" (2020) 10 *Constitutional Court Review* 379 391.

is not in a habitable state of repair. It should be noted that having established that a minimum standard is not currently present – at least not overtly – in the case of usufructuaries does not mean that such a state of affairs is necessarily unconstitutional. This is because the common-law construct of a usufruct is not necessarily inconsistent with the Constitution, especially when one reflects on the subsidiarity principle in the context of usufructuaries. The subsidiarity principle, where usufructuaries are concerned, prescribes that where there is no legislation crafted to deal with rights of usufructuaries, the common law should directly be relied on by the usufructuary to protect the usufructuary interest.<sup>43</sup> If the common-law position is not in conflict with constitutional rights as observed in chapter 4, where case law like *De Douallier* showed how creative a court can be to ensure the right of a usufructuary to a habitable dwelling, the common law should arguably be left intact as it is presumed to be in line with the Constitution. This, however, may not always be the case. Thus, in instances where the common law is found to be in conflict with constitutional rights such as human dignity, the common law must be developed to promote the spirit and objectives of the Constitution.<sup>44</sup> This may occur in instances where a usufructuary seeks to ensure a dwelling is habitable and application of the common law does not allow for that possibility. In those instances, the Constitution could arguably be invoked to derive a minimum standard of habitability. Considering these results, it is necessary to provide some indications of the best approach for South African law going forward when it comes to habitability for all three categories of comparison.

#### **6 4 The way forward on habitability for all three types of inhabitants**

Many of the sources that were discussed on the standard of habitability for tenants, usufructuaries and occupiers in chapters 3, 4 and 5 of the dissertation were based on literature and case law. The analysis of literature and case law tried to establish what should be the minimum standard of habitability for tenants, usufructuaries and occupiers in South African law. The salient issue about habitability for these types of inhabitants is the manner in which these inhabitants approach their respective sources of law to find a remedy, as it relates to habitability, to ensure that the property is in a

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<sup>43</sup> AJ van der Walt *The Law of Servitudes* (2016) 40.

<sup>44</sup> See section 39(2) of the Constitution. See further Van der Walt *The Law of Servitudes* 43-44.

habitable condition. The sources of law that tenants, usufructuaries and occupiers rely on are characterised by similarities, differences, and nuances.<sup>45</sup> However, the way forward for these types of inhabitants will not be as simple and smooth as it may seem. For instance, there is concern whether the amendments in the RHAA will go beyond the pages of the RHAA and be implemented to ensure that both the rich and poor tenants are fully protected or covered. In this regard, where the property let is in disrepair the courts should not be reluctant to order the owner of the property to specifically perform the clearly stated mandatory requirements of the RHAA. This will give tenants substantive rights as it is the actual aim of the RHAA.

For usufructuaries, it is not clear whether the leap to ensure that the usufruct is placed in a habitable state of repair that was made in *De Douallier* will be done in a similar case in future. Consequently, it will be interesting to see whether South African courts link habitability with human dignity or other fundamental rights as in the context of tenants and occupiers to ensure the protection of human dignity, security of tenure or access to adequate housing, even in the context of usufructuaries, where no such recognition has been seen before. Usufructuaries should begin to also rely on the Constitution as a possible source of law to find their remedy instead of heavily relying on the common law, unless of course the common law is read in line with the Constitution.

Concerning occupiers, the concern is with poor occupiers who do not have the means to bring the dwelling into a habitable state. What will happen to those poorer occupiers if the landowner is found not to be liable to ensure that the dwelling is habitable? Will they have to depart from the dwelling due to appalling conditions, or will the state be called upon to ensure that they dwell in conditions that protect their human dignity? Arguably, the dissertation shows that there should be a minimum standard even in the context of occupiers. It is not clear in terms of case law what will happen, but one surely hopes that those occupiers will be taken care of. Here again, an argument is made concerning poor occupiers that they too should deserve a minimum standard. It should be mentioned that this would be an extension of the existing law, which currently allows the occupier to make the improvements, presumably not catering for less wealthy occupiers.

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<sup>45</sup> See chapter 3, 4 and 5 above.

Nonetheless, there are interesting observations that must be taken into consideration when one reflects on the way forward on habitability for tenants, usufructuaries and occupiers in the new constitutional dispensation. Habitability essentially includes entitlements like the right to reside on, use and enjoy the property; security of tenure; and the right to make improvements with(out) the owner's consent. These entitlements ordinarily go with these categories of inhabitants, which indicate that when the respective owners provide the tenants, usufructuaries and occupiers with permission to occupy or use the dwelling, they have certain obligations immediately. These obligations cannot be denied or negated. Consequently, these types of inhabitants can use these entitlements as measures to hold their landowners liable to place and maintain their dwellings in a habitable state. This shows that owning property in the constitutional era comes with certain responsibilities that cannot be avoided and that the right to ownership is no longer classified as a higher right in the order of rights.<sup>46</sup>

In this regard, it was flagged in chapters 3, 4 and 5 that *all* three categories of inhabitants are entitled to the right to use and enjoy the property belonging to the owner, which is informed by the Constitution. As Madlanga J held in *Daniels*, in respect of occupiers in terms of ESTA, the notion of residing on and use of a dwelling must mean that the dwelling is habitable.<sup>47</sup> Arguably, *all* three types of inhabitants of property belonging to owners must reflect on this idea. As it is evident from the chapters of the dissertation dealing with the categories of comparison, the tenant, usufructuary or occupier is generally standing up against an owner who has failed, neglected or refused to provide and ensure that the dwelling is in a habitable state of repair, and case law shows that the contestation by these types of inhabitants is valid and should be protected in terms of the Constitution, legislation or the common law in the respective context. It is therefore submitted that the existing individual standard revealed in each category of comparison should be followed. However, where the individual standard is not enough in the respective category to cover areas that are not specifically listed by the existing standard, the courts should interpret habitability broadly in that particular context to include additional features closely related to the existing minimum standard as required by the Constitution. This should be done in

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<sup>46</sup> *Baron v Claytile (Pty) Ltd* 2017 5 SA 329 (CC) para 35.

<sup>47</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) para 32.

instances where the law might be flawed and shows inconsistencies in terms of what constitutes habitability. The flaws of the law should not be left intact. This will create unnecessary tensions. As such, any defects in the law in respect of what comprises a “habitable dwelling” should be either developed or even amended to reflect the ethos or values of the Constitution.<sup>48</sup>

Finally, it must be noted that South African law on the question of the habitability of dwellings for these different categories of inhabitants has made interesting progress, especially in the context of tenants and occupiers. For tenants, habitability will be included in legislation for the first time and South Africa will become part of the few countries where the habitability of dwellings for tenancy is a statutory requirement.<sup>49</sup> Thus, the express inclusion of habitability in the RHAA will give tenants greater protection against unfair landowners. For occupiers, the common law formalistic approach of asking for permission to effect improvements to bring a dwelling in a habitable condition has been dealt with in light of *Daniels*. Now occupiers can improve the dwelling in the form of preserving it without the consent of the property owner, but after proper meaningful engagement with the landowner (or person in charge) to ensure the property’s habitability and that a balance of the conflicting rights and interests of occupiers and owners is maintained.<sup>50</sup> This is because the matter was considered in light of the Constitution and not in isolation. When it comes to usufructuaries, the formal, but not rigid, common-law regulating the construct of a usufruct is still intact. As emphasised the common-law construct of a usufruct is not necessarily in conflict with constitutional rights such as human dignity, security of tenure and access to adequate housing. Consequently, the common law cannot be easily changed or developed on the basis that an outcome of a case was fair or unfair.<sup>51</sup> However, the courts should in future cases continue to take cognisance of the Constitution in matters relating to habitability in the common-law construct of a usufruct. One thing is certain: The prospect of habitability in the context of dwellings made available for residential use is exciting as there remains room to question the

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<sup>48</sup> See the Preamble of the Constitution; section 1 of the Constitution.

<sup>49</sup> For countries where habitability of dwellings for tenants is already a statutory requirement, see for instance the United Kingdom and the United States of America. For details on how habitability works in these countries, see generally S Viljoen *The Law of Landlord and Tenant* (2016) 201-206.

<sup>50</sup> *Daniels v Scribante* 2017 4 SA 341 (CC) paras 60-62.

<sup>51</sup> Van der Walt *The Law of Servitudes* 38 and 42.



state of affairs and to understand the notion of habitability to ensure that people live in dignified and adequate dwellings as we look forward to the future.

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